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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. [redacted] 39.

BYRON F. BABBITT, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF RANDOLPH-MACON COAL COMPANY, APPELLANT,

vs.

HOWARD DUTCHER, SECRETARY OF RANDOLPH-MACON COAL COMPANY, AND JAMES T. GARDINER, PRESIDENT OF RANDOLPH-MACON COAL COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 18, 1907.

(20,941.)

(20,941.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 538.

BYRON F. BABBITT, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF RANDOLPH-MACON COAL COMPANY, APPELLANT,

vs.

HOWARD DUTCHER, SECRETARY OF RANDOLPH-MACON COAL COMPANY, AND JAMES T. GARDINER, PRESIDENT OF RANDOLPH-MACON COAL COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1907.

1 In the District Court of the United States for the Southern District of New York.

In the Matter of the Petition of BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of Randolph-Macon Coal Co., a Corporation, against Howard Dutcher, Secretary of said Bankrupt, and James T. Gardiner, its President.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Upon the annexed petition of Byron F. Babbitt, sworn to on the third day of October, 1907, it is

Ordered that James T. Gardiner and Howard Dutcher be and appear in this court at the court room in the Post Office Building in the Borough of Manhattan in The City of New York on the 7th day of October, 1907, at the opening of court on that day, or as soon thereafter as counsel can be heard, and show cause why the prayer of said petitioner shall not be granted, and an order entered directing the said James T. Gardiner and Howard Dutcher, or either of them, to deliver to your petitioner the stock-certificate book, corporation minute book and stock ledger of said Randolph-Macon Coal Co., together with all other records and documents belonging to said corporation in their possession or under their control; and it is further

2 Ordered that service of a copy of this Order upon each of said James T. Gardiner and Howard Dutcher, on or before October 5th, 1907, shall be sufficient.

Dated, Southern District of New York, October 3, 1907.

GEO. C. HOLT, *Judge.*

3 In the District Court of the United States for the Southern District of New York.

In the Matter of the Petition of BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of Randolph-Macon Coal Co., a Corporation, against Howard Dutcher, Secretary of said Bankrupt, and James T. Gardiner, its President.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Your petitioner, Byron F. Babbitt, trustee in bankruptcy of the estate of the Randolph-Macon Coal Co., a corporation, respectfully states that on the 21st day of February A. D. 1907 a petition in bankruptcy was filed in the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri against the Randolph-Macon Coal Co. a corporation duly organized under the laws of the State of Missouri; that thereafter, and to wit on the 26th day of March A. D. 1907, said Randolph-Macon

Coal Co. was by said court duly adjudged a bankrupt, a certified copy of which said order of adjudication is hereto attached and marked "Exhibit A."

That thereafter and to wit on the 10th day of May A. D. 1907 your petitioner was duly appointed trustee in bankruptcy of said Randolph-Macon Coal Co. and, on said 10th day of May A. D. 1907 duly qualified as such by giving bond in the penal sum of

4 Thirty thousand dollars ($30,000.) a certified copy of the order of the Referee in Bankruptcy approving said bond being hereto attached and marked "Exhibit B," and that your petitioner brings this petition in his capacity as trustee in bankruptcy of said corporation.

Your petitioner further states on information and belief that at the time said petition in bankruptcy was filed against said bankrupt as aforesaid, the said James T. Gardiner was President, and said Howard Dutcher was Secretary of said Company, and that said parties are now acting, respectively, as President and Secretary of said Randolph-Macon Coal Co.

That certain books and papers relating to the business of said bankrupt, to wit the stock-certificate book, or books, the corporation minute book, and stock ledger have been and are now in the possession and custody or under the control of either said President or Secretary or both of them and that said stock-certificate book, corporation minute book and stock register book are necessary to your petitioner as trustee in bankruptcy of said Randolph-Macon Coal Co. in his administration and settlement of its affairs.

That your petitioner has requested and demanded of said James T. Gardiner as President and said Howard Dutcher as Secretary, that they deliver or cause to be delivered to your petitioner as such trustee in bankruptcy, said stock-certificate book, corporation minute book and stock ledger, but that demand and request have been refused in writing, a copy of which refusal is hereto attached and marked "Exhibit C."

5 Wherefore, your petitioner prays for an order directing the said James T. Gardiner and Howard Dutcher, or either of them, to deliver to your petitioner the stock-certificate book, corporation minute book and stock ledger of said Randolph-Macon Coal Co., together with all other records and documents belonging to said corporation in their possession or under their control, and your petitioner as in duty bound will ever pray.

HORNBLOWER, MILLER & POTTER,
Attorneys for Petitioner.

Office & P. O. Address, 24 Broad Street, Borough of Manhattan, The City of New York.

STATE OF NEW YORK, *County of New York, ss:*

Byron F. Babbitt, being duly sworn says: that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge

except as to the matters stated therein to be alleged on information and belief, and that as to those matters he believes it to be true.

BYRON F. BABBITT.

Sworn to before me this 3rd day of October, 1907.

WM. R. SAINSBURY,

[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

6 EXHIBIT "A."

In the District Court of the United States for the Eastern District of Missouri.

No. 1083.

In the Matter of RANDOLPH-MACON COAL COMPANY (a Corporation), Bankrupt.

In Bankruptcy.

At St. Louis, in said District.

TUESDAY, *March 26th*, A. D. 1907.

This day this cause came on to be heard in said court upon the petition of Western Iron and Supply Company (a corporation) *et al.* petitioning Creditors that Randolph-Macon Coal Company (a corporation) be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, and thereupon and upon consideration of the proofs and answer filed in said cause it was found that the facts set forth in said petition were true; and it is therefore adjudged that said Randolph-Macon Coal Company (a corporation) is a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy.

Witness, the Honorable Jacob Trieber Judge of said Court and the seal thereof, at St. Louis, in said Division of said District, this 26 day of March, A. D., 1907.

[SEAL.] (Signed) JAMES R. GRAY, *Clerk.*

7 UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I, Walter W. Nall, Clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify the writing hereto annexed to be a true copy of the Order of Adjudication in Case No. 1083 in the Matter of Randolph-Macon Coal Company (a corporation,) Bankrupt, in Bankruptcy, as fully as the same remains on file in said matter in my office.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Court, at office in the City of St. Louis, in said District, this 23rd day of September in the year of our Lord nineteen hundred and seven.

[SEAL.] (Signed) W. W. NALL,
Clerk of said Court.

8 EXHIBIT "B."

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In the Matter of RANDOLPH-MACON COAL CO., a Corporation, Bankrupt.

In Bankruptcy. No. 1083.

At St. Louis, Missouri, in said Division of said District, on the 10th day of May, A. D., 1907.

It appearing to the Referee that Byron F. Babbitt, of the City of St. Louis, State of Missouri, has been duly appointed Trustee of the estate of the above named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by creditors, to wit: in the sum of Thirty-thousand Dollars ($30,000.00); it is ordered that the said bond be, and it is hereby approved.

WALTER D. COLES,
Referee in Bankruptcy.

9 UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I, Walter D. Coles, one of the Referees in Bankruptcy for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify the writing hereto annexed to be a true copy of the order approving the bond of Byron F. Babbitt, as Trustee, in bankruptcy of the Estate of Randolph-Macon Coal Co., Bankrupt,

In Case No. 1083,

In the Matter of RANDOLPH-MACON COAL COMPANY, a Corporation, Bankrupt,

In Bankruptcy,

as fully as the same remains of record in said matter in my office.

In witness whereof, I have hereunto subscribed my name, at my office in the City of St. Louis, in said Division of said District this 27th day of September, in the year of our Lord, Nineteen Hundred Seven.

(Signed) WALTER D. COLES,
Referee in Bankruptcy.

10 UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:.

I, W. W. Nall, Clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, certify that Walter D. Coles, Esquire, is a duly appointed and qualified Referee in Bankruptcy for the Eastern Division of the Eastern Judicial District of Missouri, at the City of St. Louis.

In witness whereof, I hereunto subscribe by name and affix the seal of said Court at my office in the City of St. Louis, in said Division of said District this 27th day of September, 1907.

[SEAL.] (Signed) W. W. NALL, *Clerk*.

11 EXHIBIT "C."

Randolph-Macon Coal Co., 11 Broadway, New York.

James T. Gardiner, President.

SEPTEMBER 24TH, 1907.

Byron F. Babbitt, Esq., c/o Messrs. Bryan & Christie, Commonwealth Trust Building, St. Louis, Mo.

DEAR SIR: Referring to your letter dated August 26th, 1907, demanding delivery of the "corporate records and stockbooks of the bankrupt company" (Randolph-Macon Coal Company), I have to advise you that I am advised that such records and stockbooks are not documents relating to the property of the bankrupt, and therefore you, as trustee in bankruptcy, are not entitled to their possession. I must, therefore, respectfully decline to accede to your request.

Very truly yours, JAS. T. GARDINER.

Endorsed: Petition of Byron F. Babbitt. Andover. Filed Oct. 28, 1907. "I am obliged to deny this motion on the authority of *Re* Von Hartz, 142 Fed. 726. Nov. 1, 1907. C. C. H.

12 In the District Court of the United States for the Southern District of New York.

In the Matter of the Petition of BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of Randolph-Macon Coal Company, a Corporation, against Howard Dutcher, Secretary of said Bankrupt, and James T. Gardiner, its President.

STATE OF NEW YORK, *County of New York, ss:*

Howard Dutcher, being duly sworn, says that he is the Secretary of the Randolph-Macon Coal Company, the corporation above mentioned; that the following books and documents are in his possession as Secretary of said Company:

1. One stock certificate book of fractional shares of stock of said corporation.

2. Three stock certificate books of one hundred shares of said corporation.

3. One stock ledger of said corporation.

4. One stock transfer book of said corporation.

5. The minutes of meetings of directors and stockholders of Randolph-Macon Coal Company.

6. Eight hundred and forty (840) unissued First Mortgage Bonds of said corporation of the par value each of $1,000.

That hereto annexed, and marked Exhibit A is a sample copy of the certificates of stock issued by Randolph-Macon Coal Company.

That hereto annexed, and marked Exhibit B, is a sample
13 copy of the stubs of the stock certificate book of fractional shares of said corporation.

That hereto annexed, and marked Exhibit C, is a sample copy of the stubs of the stock certificate book of said corporation of lots of one hundred shares.

That hereto annexed, and marked Exhibit D, is a sample copy of a page of the stock ledger of said corporation.

That hereto annexed, and marked Exhibit E, is a sample copy of a page of the stock transfer book of said corporation.

That said books contain no other information, except that called for by said sample copies hereto annexed.

That deponent is informed and believes, and advised by counsel, that said books and documents in his possession are not documents relating to the property of the bankrupt, and that said trustee in bankruptcy is not entitled to their possession, and has no title thereto.

Deponent is further informed by counsel and believes that this Honorable Court has not jurisdiction to compel the delivery of these books and documents to said trustee in bankruptcy in the above entitled proceeding.

Deponent therefore respectfully objects to the jurisdiction of the court.

That James T. Gardiner, the President of the Randolph-Macon Coal Company, is, as deponent is informed and believes, by telegrams received from him today, at present in route between New Orleans and Sturgis, Kentucky, and will not return to this city until the latter part of next week. That the said Gardiner departed from this city the day after he was served with the order to show cause in the above entitled proceeding; that his arrangements to leave on this trip, which was on a matter of important business, had
14 been made for at least a week prior to the beginning of the above entitled proceeding, and this is the reason why no affidavit from said Gardiner is produced on this application.

HOWARD DUTCHER.

Sworn to before me this 24th day of October, 1907.

[SEAL.] HARRY M. AUSTEN,
Notary Public in and for Queens County.

Certificate filed in New York County.

15 EXHIBIT A.

Number —. Shares —.

Incorporated under the Laws of the State of Missouri.

Randolph-Macon Coal Company.

This is to certify that —— —— is the registered holder of — Shares in the Capital Stock of Randolph-Macon Coal Company of One Hundred Dollars ($100) each, fully paid, transferable only on the books of said Company by the said holder in person or by attorney upon surrender of this certificate properly endorsed.

In witness whereof this certificate has been signed on behalf of said Company by its President or its Vice President and by its Treasurer this — day of ——, 19—.

———,
Vice President.

—— ——, *Treasurer.*

Capital Stock, $5,000,000.

[On the margin:]

Registered
—— —, 190—.

CENTRAL TRUST COMPANY OF NEW YORK, *Registrar.*

By ——— ———,

Countersigned

———,
Transfer Agent.

16 EXHIBIT B.

No. 18.

10 Shares

Issued to

C. Everett Murray.

Trans. Ctf. A. 9. Geo. J. Kobusch.

August 9, 1905.

Received Randolph-Macon Coal Co. Certificate No. 18 for 10 Shares of stock dated Aug. 9, 1905.
Aug. 10, 1905.

MACKAY & CO.,
Per R. F. ELLIMAN.

17 EXHIBIT C.

No. A607.

One Hundred Shares

Issued to

Robert Benson & Company

July 6th, 1906.

Received Randolph-Macon Coal Co. Certificates Nos. A568 to A607 for 4000 Shares of stock dated July 6th, '05 to the order of Robert Benson & Co.

July 10, 1906.

WM. A. READ & CO.,
OLCOTT

18 EXHIBIT D.

Dr.							Cr.
	Certificate issued.				Certificate cancelled.		
Date.	Number of certificate.	Number of shares.	Folio.	Date.	Number of certificate.	Number of shares.	Folio.

19

Exhibit E.

Date.	We, the undersigned, hereby sell, transfer and assign so many shares of stock of this company to the persons whose names are set opposite, as per certificate surrendered and cancelled.	Ledger folio.	No. certificates surrendered.	No. shares transferred.	Favor of	Ledger folio.	No. certificates issued.	No. shares.	Total No. shares.	We, the undersigned, hereby acknowledge the receipt of the number of shares of stock in this company set opposite our respective names, subject to the by-laws of company.

Endorsed: Affidavit of Howard Dutcher. Filed Oct. 28, 1907.

20 At a Stated Term of the District Court of the United States, for the Southern District of New York, held at the Post Office Building in the Borough of Manhattan, City of New York, on the 14th day of November, 1907.

Present: Hon. George C. Holt, District Judge.

In the Matter of the Petition of Byron F. Babbitt, Trustee in Bankruptcy of the Estate of Randolph-Macon Coal Company, a Corporation, against Howard Dutcher, Secretary of said Bankrupt, and James T. Gardiner, its President.

In Bankruptcy.

The motion, brought on by the order to show cause herein granted by Honorable George C. Holt, District Judge, on the third day of October, 1907, directing that James T. Gardiner and Howard Dutcher show cause why an order should not be entered herein directing them to deliver to the petitioner the stock certificate book, corporation minute book and stock ledger of said Randolph-Macon Coal Company, together with all other records and documents belonging to said corporation in their possession or under their control, having duly come on to be heard:

Now upon reading and filing the petition of Byron F. Babbitt herein, verified the 3rd day of October, 1907, and said order to show cause, dated October 3, 1907, and the affidavit of Howard Dutcher, verified October 24, 1907; and after hearing Morgan M.
21 Mann, Esq., of counsel for the petitioner in support of said motion, and George W. Wickersham, Esq., of counsel for the respondents James T. Gardiner and Howard Dutcher, in opposition thereto, and the court being of the opinion that it is without jurisdiction in the premises, on motion of Strong & Cadwalader, attorneys for said respondents, it is

Ordered that said motion be, and the same hereby is denied on the ground that this court is without jurisdiction to entertain this proceeding or the petition therein or to grant the relief prayed for.

(Signed) GEO. C. HOLT,
District Judge.

Endorsed: Order denying motion. Filed Nov. 12, 1907.

22 In the District Court of the United States for the Southern District of New York.

In the Matter of the Petition of Byron F. Babbitt, Trustee in Bankruptcy of the Estate of Randolph-Macon Coal Company, a Corporation, against Howard Dutcher, Secretary of said Bankrupt, and James T. Gardiner, its President.

In Bankruptcy.

In this proceeding I hereby certify that the order herein made denying the motion and refusing to grant the relief prayed for herein is based solely on the ground that this Court is without jurisdiction

to entertain a proceeding instituted by a Trustee in Bankruptcy duly appointed in a bankruptcy proceeding pending in another district, to compel the officers of the bankrupt to deliver to such Trustee the documents in their possession relating to the business of the bankrupt.

This certificate is made conformable to the Act of Congress of March 3, 1891, Chapter 517, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings, together with this certificate.

Dated this 27th day of November 1907.

GEO. C. HOLT,
United States District Judge.

Endorsed: Certificate of question of jurisdiction on appeal. Filed Nov. 27, 1907.

23 In the District Court of the United States for the Southern District of New York.

In the Matter of the Petition of Byron F. Babbitt, Trustee in Bankruptcy of the Estate of Randolph-Macon Coal Company, a Corporation, against Howard Dutcher, Secretary of said Bankrupt, and James T. Gardiner, its President.

In Bankruptcy.

The above-named petitioner, conceiving himself aggrieved by an order made and entered by this Court in the above entitled proceeding on the 11th day of November 1907, wherein and whereby it was ordered that the petition herein be denied on the ground that the Court was without jurisdiction to entertain the proceeding or to grant the relief prayed for therein, desires to appeal to the Supreme Court of the United States from said order, and therefore prays that this, his petition, for such appeal may be allowed, and that the transcript of the record, proceedings and papers upon which the aforesaid order was made may be sent, duly authenticated, to the Supreme Court of the United States.

Dated November 27, 1907.

BYRON F. BABBITT, *Petitioner.*
By HORNBLOWER, MILLER & POTTER, *His Attorneys.*

Endorsed: Petition for appeal. Filed Nov. 27, 1907.

24 In the District Court of the United States for the Southern District of New York.

In the Matter of the Petition of BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of Randolph-Macon Coal Company, a Corporation, against Howard Dutcher, Secretary of said Bankrupt, and James T. Gardiner, its President.

In Bankruptcy.

Order Allowing Appeal.

The above named petitioner, having presented his petition asking leave to appeal to the Supreme Court of the United States from an order entered in this proceeding on the 14th day of November 1907, denying the motion made therein and refusing to grant the relief prayed for therein on the ground that the Court had no jurisdiction in the premises,

Now on motion of Hornblower, Miller & Potter, attorneys for said petitioner, it is Ordered that an appeal to the Supreme Court of the United States from the order heretofore filed and entered herein, denying said motion and *and* refusing to grant the relief prayed for therein on the ground of want of jurisdiction, be and the same is hereby allowed, and that the certified transcript of the record and of all proceedings herein be forthwith transmitted, duly authenticated, to the Supreme Court of the United States.

Dated November 27th, 1907.

GEO. C. HOLT,
United States District Judge.

Endorsed: Order allowing appeal. Filed Nov. 27, 1907.

25 In the District Court of the United States for the Southern District of New York.

In the Matter of the Petition of BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of Randolph-Macon Coal Company, a Corporation, against Howard Dutcher, Secretary of said Bankrupt, and James T. Gardiner, its President.

In Bankruptcy.

The President of the United States to Howard Dutcher, Secretary of Randolph-Macon Coal Company, and James T. Gardiner, President of Randolph-Macon Coal Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, District of Columbia, on the 23 day of December 1907, pursuant to an appeal filed in the clerk's office of the district court of

the United States, southern district of New York, wherein Byron F. Babbitt, as Trustee in Bankruptcy of the Estate of Randolph Macon Coal Company, a corporation, is the petitioner, and you are the respondents, to show cause, if any there be, why the order in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, Hon. George C. Holt, Judge of the District Court of the United States, Southern District of New York, this 27 day of Nov., 1907, and of the Independence of the United States the one hundred and thirty-second.

GEO. C. HOLT,
United States District Judge.

Endorsed: Citation. Filed Dec. 5, 1907. A copy of the within paper received this Nov. 27, 1907. Strong and Cadwalder, att'ys for ——— ——.

26 In the District Court of the United States for the Southern District of New York.

In the Matter of the Petition of BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of Randolph-Macon Coal Co., a Corporation, against Howard Dutcher, Secretary of said Bankrupt, and James T. Gardiner, its President.

In Bankruptcy.

Assignment of Errors.

Comes now the petitioner in the above entitled proceeding and assigns errors in the decision and order of the District Court of the United States for the Southern District of New York in the above entitled proceeding as follows:

First. The Court erred in denying the motion;

Second. The Court erred in holding that it was without jurisdiction to entertain this proceeding or to grant the relief prayed for herein.

In order that the foregoing assignment of errors may be and appear of record the petitioner presents the same to the court and prays that such disposition may be made thereof as needed, in accordance with the law and statutes of the United States in such cases made and provided, and the petitioner prays a reversal of said order made and entered by said Court.

HORNBLOWER, MILLER & POTTER,
Attorneys for Petitioner.

Endorsed: Assignment of errors. Filed Nov. 27, 1907.

27 UNITED STATES OF AMERICA.
Southern District of New York, ss:

In the Matter of the Petition of BYRON F. BABBITT, Trustee in Bankruptcy of Randolph-Macon Coal Company, a Corporation, Petitioner-Appellant, against Howard Dutcher, Secretary of said Bankrupt, and James T. Gardiner, its President, Respondents-Appellees.

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled matter.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 14th day of December in the year of our Lord one thousand nine hundred and seven and of the Independence of the said United States the one hundred and thirty-second.

[Seal District Court of the United States, Southern District of N. Y.]

THOS. ALEXANDER, *Clerk.*

28 [Endorsed:] U. S. District Court, Southern District of New York. In the Matter of the Petition of Byron F. Babbitt, Trustee in Bankruptcy of the Estate of Randolph-Macon Coal Company, a Corporation, Petitioner-Appellant, against Howard Dutcher, Secretary of said Bankrupt, and James T. Gardiner, its President, Respondents-Appellees. Certified copy of Record on appeal.

Endorsed on cover: File No. 20,941. S. New York D. C. U. S. Term No. 538. Byron F. Babbitt, trustee in bankruptcy of the estate of Randolph-Macon Coal Company, appellant, *vs.* Howard Dutcher, secretary of Randolph-Macon Coal Company, and James T. Gardiner, president of the Randolph-Macon Coal Company. Filed December 18th, 1907. File No. 20,941.

United States Supreme Court,

OCTOBER TERM, 1909.

No. 39.

BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of the Randolph-Macon Coal Company,

Appellant,

against

HOWARD DUTCHER, Secretary of Randolph-Macon Coal Company, and JAMES T. GARDINER, President of Randolph-Macon Coal Company,

Appellees.

BRIEF FOR APPELLANT.

WILLIAM B. HORNBLOWER,
MORGAN M. MANN,
Of Counsel for Appellant.

C. G. Burgoyne, 72 to 76 Spring Street, New York.

United States Supreme Court,

OCTOBER TERM, 1909.

No. 39.

BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of the Randolph-Macon Coal Company,
Appellant,

AGAINST

HOWARD DUTCHER, Secretary of Randolph-Macon Coal Company, and JAMES T. GARDINER, President of Randolph-Macon Coal Company,
Appellees.

BRIEF FOR APPELLANT.

This is an appeal taken directly to this Court on the question of jurisdiction from an order entered in the District Court of the United States for the Southern District of New York on November 27, 1907, denying an application made by the appellant, as trustee in bankruptcy of the Randolph-Macon Coal Company, Bankrupt, for an order directing James T. Gardiner, the President, and Howard Dutcher, the Secretary of said Company, or either of them, to deliver to him the stock certificate book, corporation minute book and stock ledger of said Company, together with all other records and documents belonging to said Company, in their possession or under their control.

The pertinent facts are as follows:

The Randolph-Macon Coal Company, a Missouri corporation, was duly adjudicated a bankrupt in proceedings instituted in the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, where it had its principal office.

The appellant was thereafter duly appointed trustee in bankruptcy of the corporation, and made demand upon the President of the Company for the delivery to him of the corporate records and stock books of the bankrupt company, which were kept in the office maintained by the Company in New York City. This request was refused by letter dated September 24, 1907, upon the ground, as set forth in that letter (Rec., p. 5), that such records and stock books were not *documents* relating to the property of the bankrupt, and that the trustee was therefore not entitled to their possession. No claim of adverse interest was set up by any other person. Gardiner and Dutcher were without the jurisdiction of the Court of Adjudication and were within that of the District Court in and for the Southern District of New York, and thereafter, upon the petition of the appellant, an order to show cause, dated October 3, 1907 (Rec., p. 1), was issued by one of the judges of the District Court of the United States for the Southern District of New York ordering them to appear and show cause why the prayer of the petition should not be granted and an order entered directing them, or either of them, to deliver to said Trustee the corporate records in their possession. The proceeding was opposed upon the grounds (affidavit of Dutcher, Rec., p. 6), that the corporate records were not *documents* relating to the property of the bankrupt, and that consequently the trustee in bankruptcy had no title thereto, and that the Court was without jurisdiction to compel their delivery to him, and the application was denied on the sole ground, as set forth in the certificate of the District Judge (Rec., p. 10), that the Court was without jurisdiction to entertain an ancillary proceeding in bankruptcy, and from that ruling this appeal is taken. The certificate (Rec., p. 11), recites that "the opinion filed herein is made part of the record and will be certified and sent up as a part of the proceedings" but the only opinion rendered by the District Judge is that embodied in the order denying the motion (Rec., p. 10, fol. 21).

ASSIGNMENT OF ERRORS.

The United States District Court for the Southern District of New York erred in the following particulars:

FIRST: In denying the motion;

SECOND: In holding that it was without jurisdiction to entertain the proceeding, or to grant the relief prayed for therein.

POINTS.

I.

The title to all books and papers relating to the business of the bankrupt was vested in the trustee in bankruptcy upon his appointment and qualification as of the date of the adjudication.

The appellees herein have taken the position (Tr., pp. 5 and 6) that the stock book, stock ledger, corporation minute book and other books and papers in their possession as officers of the bankrupt are not "documents" within the meaning of Subdivision 1 of Section 70 of the Act of 1898, and that consequently the appellant, as its trustee in bankruptcy, is not entitled to the possession of them, although they do not assert any title in themselves adverse to that of the bankrupt.

Subdivision 1 of Section 70 of said Act declares that the trustee of the estate of a bankrupt shall be vested, by operation of law, as of the date of adjudication, with the title of the bankrupt to all (1) "*documents* relating to his property" and Subdivisions 13 of Section 1 of said Act declares that the word "document" as used in the Act shall be construed to "include any book, deed or instrument in writing.

In our opinion the question as to whether not these or books and papers are "documents" within the letter of the Act is

immaterial, for certainly they are personal property of the corporation as much as its office furniture and fixtures are, and the trustee in bankruptcy became entitled to their possession upon qualification, for as this Court has said in *Mueller v. Nugent*, 184 U. S. 1,

> " on adjudication title to the bankrupt's property became vested in the trustee (Section 70), with actual or constructive possession, and belongs in the custody of the bankruptcy court."

The precise point, however, was passed upon in the *Matter of Hess*, 134 Fed. Rep., 109, which came before the District Court for the Eastern Division of Pennsylvania upon an order to show cause why the bankrupt should not produce books and pay over funds in his hands, and that court held (p. 111) that :

> " Under section 70, class 1, the trustee of a bankrupt is vested by operation of law with the title to all ' documents relating to the bankrupt's property.' Section 1, clause 13, defines a ' document ' to include any books, deed or instruments of writing, and includes deeds, and all other muniments of title, contracts, securities, bills receivable, notes, bank books, bills of exchange, account books, and all papers and books relating to his business. These books and papers of the bankrupt, which come within the designation of *documents*, are regarded by the Bankrupt Act as *personal property*, the title to which, by operation of law, is vested in the trustee. They are valuable, not so much as an asset that can be converted for the purpose of meeting the demands of creditors, as they are for their importance as evidence by which assets can be discovered by the trustee."

II.

It was proper to resort to summary proceedings in a Court of Bankruptcy rather than to an action of replevin in a State Court.

It may be argued that a replevin action in the State Courts was available, but the question of the proper practice in a matter of this character was settled by this Court in *Mueller vs. Nugent (supra)*, where money was retained by the respondent as Agent of the Bankrupt, and without any claim of adverse interest in himself, and it was held that in such cases the Bankruptcy Courts had the power, upon a petition and rule to show cause, to compel the surrender of money or other assets of the bankrupt to the Trustee in Bankruptcy, the Court saying in its opinion, per Mr. Chief Justice FULLER (p. 14):

> "In other words, the question reduces itself to this. *Has the bankruptcy court the power to compel the bankrupt or his agent to deliver up money or other assets of the bankrupt in his possession or that of some one for him, on petition and rule to show cause?* Does a mere refusal by the bankrupt or his agent so to deliver up, oblige the trustee to resort to a plenary suit in the circuit court or a state court, as the case may be? If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected and to determine controversies relating thereto, will be seriously impaired and in many respects rendered practically inefficient. * * * *The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact and therefore an adverse claim when the petition was filed, and to that we cannot give our consent.*"

III.

The District Court of the United States in and for the Southern District of New York had jurisdicison to entertain this proceeding and to grant the relief prayed for.

This raises directly for the first time in this Court, so far as we are advised, the question of the ancillary jurisdiction of the District Courts of the United States sitting as "courts of bankruptcy," *under the Act of 1898*, although it has been considered by some of the District and Circuit Courts, and has, as said *In re Benedict* (*post*), "elicited adverse judicial decisions."

The respective provisions of the Acts of 1867 and 1898, conferring jurisdiction in bankruptcy matters upon the District Courts of the United States, are almost similar in terms, and, in our opinion, exactly similar in effect, but while this Court, and almost every Court that has passed upon the question, has held in construing the Act of 1867, that ancillary jurisdiction existed because it was not *expressly prohibited*, and because, as was said by Mr. Justice BRADLEY in *Lathrop vs. Drake* (*post*), "it would seem to be the necessary result of the original jurisdiction conferred upon them and is in harmony with the scope and design of the Act," such of the Courts as have held that ancillary jurisdiction did not exist under the Act of 1898, have so held upon the ground that it was not *expressly conferred* by the Act.

Section 1 of the Act of 1867 constituted the District Courts of the United States "courts of bankruptcy," and provided that they should have "*original jurisdiction in their respective districts* in all matters and proceedings in bankruptcy," the jurisdiction thereby conferred extending "to the collection of all the assets of the bankrupt" and "to all acts, matters and things to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt and the closing of the proceeding in bankruptcy."

Subdivision 8 of Section 1 of the Act of 1898 defines the words "courts of bankruptcy" to mean the several District

Courts of the United States (and certain territorial Courts), and Section 2 thereof invests courts of bankruptcy "*within their respective territorial limits*" with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to (7) "cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto, except as herein otherwise provided" and (15) "to make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act," and we call the Court's attention at this point to the fact that the Act of 1898 draws a sharp distinction between the *court of adjudication* and *courts of bankruptcy* at large, for Subdivision 7 of Section 1 thereof defines the word "court", as used in the act, to mean "the court of bankruptcy in which proceedings are pending" and the Act does not either expressly or by implication limit the power to "make such orders, issue such process," etc., to "courts", as therein defined but confers it upon "courts of bankruptcy" generally.

The whole question of the ancillary jurisdiction of the district courts under the Act of 1867 was considered in *Luthrop vs. Drake, et al.*, 91 U. S., 516, which was a suit to compel the defendants to restore to the bankrupt's estate the value of property sold by them in fraud of the act and involved the right of an assignee in bankruptcy, without regard to the citizenship of parties, to maintain a suit for the recovery of assets in a Circuit Court of the United States in a district other than that in which the decree of bankruptcy was made. The original act provided that :

> "The several Circuit Courts shall have concurrent jurisdiction with the District Courts of the same District of all suits at law or in equity * * * brought by the assignee in bankruptcy against any person claiming an adverse interest or by such person against such assignee touching any property or rights of property of such bankrupt transferable to or vested in said assignee."

To determine the question it was held that it was necessary to examine the jurisdiction conferred upon the district courts

by the Act. The Court in its opinion, per Mr. Justice BRADLEY, said:

> "Their jurisdiction is confined to their respective districts, it is true; *but it extends to all matters and proceedings in bankruptcy without limit.* When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. *Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy, without limitation.* There are, it is true, limitations elsewhere in the act; but they affect only the matters to which they relate. Thus, by sect. 11, the petition in bankruptcy, and by consequence the proceedings thereon must be addressed to the judge of the judicial district in which the debtor has resided, or carried on business, for the six months next preceding; and the District Court of that district, being entitled to and having acquired jurisdiction of the particular case, necessarily has such jurisdiction exclusive of all other district courts, so far as the proceedings in bankruptcy are concerned. *But the exclusion of other district courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction;* and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. *That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act.* The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collections of debts; and it is not to be

presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. *But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise.* The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of Shearman v. Bingham, 7 Bank Reg., 490; and we concur in the opinion there expressed, that the several district courts have jurisdiction of suits brought by assignees appointed by other district courts in cases of bankruptcy."

In *Sherman vs. Bingham*, Fed. Cas. No. 12,762, referred to in Lathrop vs. Drake (*supra*), also construing the Act of 1867, there was a plea to the jurisdiction on the ground that an assignee in bankruptcy of a person declared a bankrupt in one district could not maintain an action to recover moneys paid the defendants, residents of another district, in the district court of such district, and this plea was sustained. Upon removal by writ of error to the Circuit Court, however, the judgment was reversed, upon the ground that the action could be maintained, Judge CLIFFORD saying:

"Two propositions are submitted by the defendants in support of the theory assumed in the court below that the district courts have no jurisdiction in such a case.

"That no jurisdiction is conferred in such a case, by section 9 of the judiciary act (1 Stat., 76), or by any other act of congress than the bankrupt act giving jurisdiction to the district courts in common law suits between party and party, which may well be admitted, as nothing of the kind is pretended by the plaintiff.

"That the bankrupt act does not confer jurisdiction in such a case, in a district other than that where the proceedings in bankruptcy are pending, which is the question presented by the plea to the jurisdiction of the district court.

"District courts have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and the argument is, that inasmuch as the jurisdiction must be exercised in the district for which the district judge is appointed, the district court, sitting as a court of bankruptcy, cannot exercise jurisdiction in any case except in the district where the bankruptcy proceedings are pending; *but section 1 of the bankrupt act contains no such limitation, nor does it contain any words which, properly considered, justify any such conclusion.*

"General superintendence and jurisdiction of all cases and questions under the act are conferred upon the several circuit courts, except where special provision is otherwise made by the first clause of section 2 of the act; but the subsequent language of the same clause makes it clear that the jurisdiction conferred by that clause can only be exercised within, and for the district 'where the proceedings in bankruptcy shall be pending.' *No such limitation, however, is found in the clause of section 1 conferring jurisdiction upon the district courts as courts of bankruptcy.* Judges of the district courts must sit undoubtedly in the districts for which they are respectively appointed, and no doubt is entertained that the process of the court in proceedings in bankruptcy cases, is restricted to the territorial limits of the district; but the language of section 1 of the bankrupt act describing the jurisdiction of the district courts, sitting as courts of bankruptcy, is, that they shall have original jurisdiction in their respective districts 'in all matters and proceedings in bankruptcy,' showing unquestionably that they can only sit, and exercise jurisdiction in their own districts; *but the limitation that the proceedings in bankruptcy must in all cases be pending in that district, is not found in that clause of section 1 of the act. On the contrary, the same section provides that the jurisdiction conferred, that is, the jurisdiction of the several district courts shall extend* to all cases and controversies arising between the bankrupt and any creditors, or creditors, who shall claim any debt or demand under the bank-

ruptcy act, and also *to the collection of all the assets of the bankrupt*, to the ascertainment and liquidation of the liens, and other specific claims thereon, to the adjustment of the various priorities and conflicting interests of all parties, and to the marshalling and disposition of all the different funds and assets, so as to secure the rights of all parties, and the due distribution of the assets among all the creditors, *and to all acts, matters and things to be done under and in virtue of the bankruptcy.*"

The same question was raised in *Goodall vs. Tuttle*, Fed. Cas. No. 5533, another case under the Act of 1867, and the same conclusion reached, the District Judge in his opinion saying:

"By the bankrupt Act of 1867 (14 Stat., 517), the jurisdiction and all the original jurisdiction created thereby was conferred upon the several district courts of the United States, which, I think, and as is generally conceded, confers upon the district court where the proceedings are pending, the power to entertain suits of this kind. *So that the question is not whether the act authorizes the assignee to sue in the ordinary mode as between party and party in any district court, but whether such right is confined to the district court where the bankruptcy proceedings are pending.* Hence it becomes necessary to inquire by what provision the district court of the same district gets such jurisdiction, and if it is found to exist, then to see by what clause it is restricted to that district. I do not understand it to be claimed that the act expressly grants such jurisdiction, but only that it results from the authority given to the court to adjudicate upon, collect the assets of, and to administer and distribute the estate of the bankrupt. The grant of jurisdiction to collect the assets, it is assumed, impliedly confers upon the courts, in the absence of any provision prescribing the manner of carrying into effect such jurisdiction, the right to adopt such form of proceeding as may be necessary and appropriate to give practical efficiency to such

grant. * * * My conclusions, therefore, are, that congress, under the power contained in the constitution, by the Act of 1867 established a uniform system of bankruptcy; and in it they attempted and intended to confide its administration to the federal courts, and for that purpose they conferred original jurisdiction upon the several district courts of the United States within their respective districts, to adjudicate upon the question of the bankruptcy, to hear all matters relating to the bankruptcy, and all questions arising between the bankrupt and his creditors, authorizing this jurisdiction to be exercised in vacation as well as in term time, and authorized a review of all such proceedings in the circuit court of the district where the proceedings were pending, by petition or otherwise, and empowered the circuit court to hear those matters in vacation or term time; that the exercise of the jurisdiction thus far was meet and proper to be had in the district court where the papers were filed, and not in any other district.

"The act further confers the power upon the district courts to collect all the assets of the bankrupt and to do all other acts necessary to be done in virtue of the bankruptcy. This, by implication, confers the authority upon the district courts to entertain jurisdiction of suits in the name of the assignee against third persons, either at law or in equity, *for the collection of the debts and property of the bankrupt, and as such jurisdiction is not expressly limited to the district courts where the proceedings are pending, and as no reason exists for such limitation, the courts are not warranted in restricting its exercise to such district.*"

Judge CHOATE of the Southern District of New York followed the rule laid down in these cases in *McGehee et al. vs. Hentz et al.*, Fed. Cas., 8794 (Act of 1867), which was a motion for an injunction to restrain the defendants from proceeding under an attachment, one of the objections raised by the defendants being that the Court had no ancillary jurisdiction, the bankruptcy proceedings having been instituted in the District Court of Louisiana; and while

the application for an injunction was denied, on the ground that the complainants were not entitled to it on the merits, the jurisdiction was upheld, the Court saying:

> "*It seems to be settled, however, that any district court in the United States has jurisdiction and authority to make all lawful orders and decrees in bankruptcy, although the original petition in bankruptcy was filed in another district, provided that the relief asked is such as cannot be given by the district court where the petition was originally filed because the person or property sought to be affected by the order or decree are beyond the reach of its process, and where they are within the reach of the process of the district court whose aid is thus invoked,*"

and in *Re Tifft*, Fed. Cas., 14034, also under the Act of 1867, which was also an application asking for an injunction restraining the sale or execution of certain property of the bankrupt on which the Sheriff had made a levy, and for other relief, and where it is said in the headnote that

> "*Any district court in the United States may, in the exercise of its ancillary jurisdiction, and in aid of the court in which the proceedings are pending, grant injunctions,* stay proceedings, enforce the provisions of composition resolutions, *or administer other summary relief as a court in bankruptcy, as to persons or property within the district, if the relief sought is such as the court in which the proceedings are pending would grant if the persons or property to be affected were within reach of the process of that court, provided that court is disabled from giving the same relief by reason of the persons or property not being subject to its process.*"

As did Judge DILLON, of the Iowa Circuit, in *Payson vs. Dietz*, Fed. Cas., 10,861).

While the decisions as to the ancillary jurisdiction of the district courts under the Act of 1867 are practically unanimous, there is a decided conflict of opinion as to the right of the district courts to exercise ancillary jurisdiction under the

Act of 1898. The whole question was ably discussed *In Re Benedict*, 140 Fed. 55, in an opinion by Judge QUARLES, who upon a petition for the appointment of an *ancillary* receiver, upheld the principle that the District Courts had ancillary jurisdiction under the Act of 1898, and said in part :

> " It will be conceded that the ancillary jurisdiction is not expressly provided for by the text of the Act of 1898. Neither was it so expressly provided under the Act of 1867 or 1841. Therefore the earlier decisions would be instructive. This same question having arisen under the Act of 1867, it was held in two cases that there was no warrant for ancillary jurisdiction (Marksam v. Heaney, Fed. Cas. 9098 ; *in re* Richardson, Fed. Cas. 11774). Thereafter the same question was considered by Mr. Justice CLIFFORD in Sherman v. Bingham, Fed. Cas. 12762 with great learning and ability * * * The case of Sherman v. Bingham seems to have been accepted as a correct exposition of the law *in re* Tifft, Fed. Cas. 14034. (In 1875 the attention of the Supreme Court of the United States was called to this question in Lathrop v. Drake, 91 U. S., 516)",

quoted at length the opinion of the Court in *Lathrop vs. Drake (supra)*, and came to the conclusion that

> " this unanimous opinion of the Court (in Lathrop v. Drake) interpreting the former act is entitled to respect, and I believe that the same construction will be imposed upon the present act."

In re Peiser, 115 Fed. 199, a receiver appointed by the District Court for the Southern District of New York applied to a Philadelphia Trust Company to pay over to him funds deposited there by the bankrupt, and upon its refusal to comply with the demand obtained an order from the New York Court directing the Company to pay over the moneys, or, upon its failure so to do, to show cause why it should not be be punished. It was, upon its failure to appear, adjudged in contempt, and the receiver was thereupon directed to apply to

the District Court for the Eastern District of Pennsylvania for its assistance in enforcing the order of contempt, and that Court very promptly granted the relief sought.

The same question of ancillary jurisdiction was considered by the District Court for the Southern District of New York *In re Sutter Bros.*, 131 Fed., 654, where it was held that the Court had ancillary jurisdiction to grant a creditor's application for the examination of witnesses, the learned Judge who decided that case stating in his opinion that he was unable to concur in the views expressed *In re Williams*, 123 Fed., 321 *(post)*; and *In re Nelson Co.*, 149 Fed., 590, Judge HOUGH of the District Court in and for the Southern District of New York, decided that while the right to determine whether or not a corporation was subject to the bankruptcy law rested solely with the court where the bankruptcy proceeding was filed, it was proper, pending decision on that point, for any other district court to appoint an *ancillary* receiver to take charge of the assets of the bankrupt within such court's territorial limits.

Loveland on Bankruptcy, in the 3d Edition of his Work, Section 21, says:

> "As has been stated, each court of bankruptcy is restricted in the exercise of its authority within its own territorial limits. It will, however, be necessary to institute proceedings ancillary to and in aid of the proceedings in bankruptcy in courts without the district in which the principal proceedings are had.
>
> "That the courts of bankruptcy for such other districts have jurisdiction to entertain auxiliary proceedings to perfect and accomplish the objects of the act can hardly be considered an open question in view of the decisions of the courts under prior acts and the reasoning upon which these decisions are based. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them and is in harmony with the scope and design of the act."

The case that controlled the District Judge in the present matter was that of *In re Von Hartz*, 142 Fed. Rep., 726

(Rec., p. 5), a decision by the Circuit Court of Appeals for the Second Circuit, wherein was presented the question as to whether or not the District Court for the Southern District of New York had jurisdiction, upon the petition of a trustee in bankruptcy appointed by the District Court of another district, to direct the respondent in a summary proceeding to deliver to the trustee a policy of life insurance upon the life of the bankrupt which had been assigned by the bankrupt to the respondent, and it was held

> " that the district court in the case at bar had no jurisdiction to make the summary order now under review."

We submit, with all due respect to that Court, that the District Court would have had no *original* jurisdiction to make such an order upon the petition of a trustee *appointed by it*, much less *ancillary jurisdiction* upon the petition of a trustee appointed by the District Court of another district, for the reason that it was clearly a controversy between a trustee, as such, and an adverse claimant, and, therefore, the title to the property in question could not have been tried out in a summary proceeding. The Court goes into no discussion of the question, but decides it squarely upon the authority of *Re Williams*, 120 Fed., 38, and 123 Fed., 321, two cases arising out of the same bankruptcy proceedings.

Re Williams, 120 Fed., 38, was a proceeding instituted in the District Court of the Eastern District of Arkansas by a petition by certain creditors of a bankrupt who had already begun proceedings in involuntary bankruptcy in the District of Colorado, before adjudication, for an injunction restraining certain debtors of the bankrupt from paying over to him or otherwise disposing of moneys due him until a trustee had been elected or a receiver appointed. The application was denied on the ground that *the Act of 1898 made no provision for ancillary or auxiliary proceedings in District Courts other than that in which the proceeding is pending.*

The Court, in its opinion, quotes the provisions of the Act of 1867, conferring jurisdiction upon bankruptcy courts, by the sixth subdivision of which it is extended to

> " all acts, matters and things to be done under and by virtue of the bankruptcy until the final distribution and

> settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy,"

cites with approval the opinion of the Supreme Court in *Lathrop vs. Drake* (*supra*), construing the Act of 1867, and reaches the conclusion that the Act of 1898 does not confer ancillary jurisdiction of any character upon District Courts, because

> " Section 23 of the act of 1898 vests jurisdiction over ' all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants,' in the circuit courts of the United States and the state courts."

The learned Judge who decided that case apparently overlooked the fact that there was before him in the proceeding neither a Trustee as such, nor an adverse claimant, and that, therefore, Section 23 had no application whatever, and also that this Court, *Mueller vs. Nugent*, *supra*, had already decided that it was not necessary to resort to a plenary suit in either the Circuit Courts of the United States or the Courts of a State where there was a mere refusal to surrender without a claim of title adverse to that of the Bankrupt.

In *Re Williams*, 123 Fed., 321, the question arose upon the application for an order for the examination of witnesses before a referee, and the Court concurred in the views expressed in the other *Williams case*, and held that it was without jurisdiction

> " because the existing bankruptcy statute is absolutely destitute of any hint of such a jurisdiction in aid of proceedings in bankruptcy pending in another district or court of bankruptcy."

It will be noted that the Court in this case points out that Congress had already supplied an adequate remedy in its pro-

vision for the appointment of commissioners to take testimony without the territorial limits of the district in which the action was brought, so that the question of ancillary jurisdiction was not the controlling one, and his opinion upon the subject was *obiter* pure and simple.

This second *Williams case* was decided by Judge HAMMOND, of the Southern District of Tennessee, who made the same ruling in *Ross, &c. Co. vs. Southern Car, &c., Co.*, 124 Fed., 403, where he denied an application for the appointment of an ancillary receiver.

The decision in *Hull vs. Burr*, 153 Fed., 945, is also *obiter*, for there the controversy was clearly one which should have been the subject of a suit at law or in equity as distinguished from a proceeding in bankruptcy. A trustee in bankruptcy, appointed in the District Court in and for the District of Massachusetts, had instituted in the District Court in and for the Southern District of Florida summary proceedings to have a deed from the bankrupt to the respondent, which deed was executed more than four months prior to the bankruptcy, declared a mortgage and to enjoin, until this question could be settled, the respondent from conveying or transferring the property conveyed thereby. Objection was made to the jurisdiction on the ground that a district court of the United States could not entertain and adjudge any such matter or controversy as was set up by said petition. This was overruled and thereupon the respondent filed his petition in the Circuit Court of Appeals for the Fifth Circuit to revise and reverse the decree of the District Court. The decree was reversed and the petition dismissed, the Court in its opinion holding that if the petition was construed as presenting a controversy at law or in equity, as distinguished from a proceeding in bankruptcy, jurisdiction was conferred on such United States Circuit Courts and such State Courts as would have had jurisdiction of such a suit by the bankrupt if there had been no bankruptcy proceeding, but that the Act of 1898 does not confer jurisdiction in such cases on a District Court, not even when it is the court of adjudication.

It considered, however, the further question as to whether or not the District Court would have had jurisdiction if the petition were to be construed as a summary proceeding to obtain possession of property and not a controversy at law

or in equity, and held that even in this view the District Court was without jurisdiction, for the reason that there was

> "no provision of the act which expressly or impliedly makes provision for summary proceedings or for auxiliary or ancillary proceedings in another court of bankruptcy in aid of the bankruptcy court that made the adjudication and has charge of the bankrupt's estate. * * * On the contrary, the act limits the jurisdiction of the bankruptcy courts, including even the one of adjudication, by providing that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted." * * *

citing in support of this: *In re Williams*, 120 Fed., *supra*; *In re Williams*, 123 Fed., *supra*; *In re Von Hartz*, 142 Fed., *supra*, which cases we have already discussed, and *In re Granite City Bank*, 137 Fed., 818 (1905).

In this last case the question was whether or not the court of adjudication had the right to direct the sale of property without the district belonging to the bankrupt and to determine all claims thereto upon proper notice to parties in interest, whether they resided within or without the district. The Court held that under the scheme of the Bankruptcy Act the District Court of the domicile of the bankrupt takes exclusive jurisdiction of the bankrupt and his property wherever situated and directs the distribution of the proceeds *pari passu* to the creditors according to their respective rights and priorities, and that only one court, that making the adjudication, can collect, marshal, administer and direct the distribution of the assets; adding what was entirely foreign to the issue, that "there are no such things in bankruptcy proceedings as courts of primary and ancillary jurisdiction." It will be noted, however, that it did not attempt to point out the method by which, in a case similar to the one at bar, a court of adjudication, through its own process, could collect assets without the district of adjudication and in the possession of some one also without the district of adjudication who declined to surrender the same.

In re Wood and Henderson, 210 U. S., 246, was a case in which there was questioned the jurisdiction of the court of adjudication, under the provisions of Section 60*d* of the Act of 1898, to re-examine on petition of the Trustee in bankruptcy the validity of the payment of money or the transfer of property of the bankrupt made in contemplation of the filing of a petition by or against him in bankruptcy to an attorney or counsellor at law for services to be rendered to him by such attorney or counsellor, and to ascertain and adjudge the reasonable amount to be allowed for such services, and to direct that the excess may be recovered by the Trustee for the benefit of the estate, where such attorney or counsellor at the time of receiving such payment or property and at the time of the proceedings in question was a non-resident of the State and of the district in which the bankruptcy court instituting such inquiry was located, and where the money or property was so paid to and held by such attorney or counsellor outside of the district of adjudication. The court of adjudication was the District Court for the District of Colorado, while the attorneys lived in the State of Arkansas, and the jurisdiction of the District Court of Colorado was challenged on the ground that neither the parties nor the subject matter was within its jurisdiction.

Section 60*d* is as follows :

> " If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney or counsellor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by *the court* on the petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate ; "

and this Court held that jurisdiction under this section was vested in the court of adjudication. It did not go into the question of the ancillary jurisdiction of the district courts sitting as courts of bankruptcy under the Act of 1898, however,

or discuss the effect of the decisions under former acts, but said in its opinion (at page 251):

> "Section 60*d* added a feature to the bankruptcy act not found in former acts, regulating practice and procedure in bankruptcy, therefore adjudications upon other provisions of the bankruptcy act, or concerning the judiciary act giving jurisdiction to the courts of the United States have no binding effect in the construction of this section."

And (at page 253):

> "Section 60*d* is *sui generis*, and does not contemplate the bringing of plenary suits or the recovery of preferential transfers in another jurisdiction. It recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And in view of the circumstances *the act makes provision that the bankruptcy court administering the estate may*, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness."

It will be observed that in none of the cases denying ancillary jurisdiction under the Act of 1898 was there a question similar to the one involved in this proceeding, that is, the right of a trustee to obtain by summary proceedings property belonging to the bankrupt in the hands of those who made no adverse claim to it, that in but one of them (Ross vs. Southern Car Co., *supra*) was the question of ancillary jurisdiction directly involved, while in the cases in which it has been upheld it was the vital issue, and that in each instance in which its existence was denied it was held that the district courts were without ancillary jurisdiction, because *the Act of*

1898 contains no express provision relative thereto, instead of holding, as do the cases under the Act of 1867, that *in the absence of an express prohibition* it is to be implied from the powers conferred upon "courts of bankruptcy" generally.

IV.

The very object of the framers of the Constitution in giving Congress power to establish "uniform laws on the subject of bankruptcies throughout the United States" (Art. I., Sec. 8, subd. 4) was to provide, through the Federal Courts, an efficient machinery for the administration of the affairs of bankrupts unhampered by state lines. There is no question under this clause of the Constitution, of conflict between state and federal jurisdiction, nor are the rights of the States, which are so carefully and jealously and properly guarded in other respects, in any way involved in the discussion of the Bankruptcy Law. That law is paramount and overrides the boundaries of the various States of the Union.

The question here is not as between the jurisdiction of the State Courts and the jurisdiction of the Federal Courts, but as between the jurisdiction of the several Federal Courts as among themselves.

It is merely a question of statutory construction. The statute should be so construed as to carry out the purpose of the bankruptcy system and to make it effective. The construction placed upon the Act by the lower court in this case, as to the ancillary jurisdiction of the United States Court in districts other than that of the adjudication of bankruptcy, manifestly renders the enforcement of the act difficult, and in many cases, actually nullifies the act. Suppose, for instance, a bankrupt in the City of New York goes to his safe and takes out five negotiable bonds and puts them in his pocket, and suppose he walks down the street and takes the ferryboat to Jersey City. If he is intercepted before he reaches the ferryboat and is served with an order to show cause, the Bankruptcy Court in the Southern District of New York, being the court

of adjudication, can undoubtedly make a summary order for the delivery over to the Trustee in Bankruptcy of the five bonds which he has taken. If, however, he is not intercepted before he reaches the New Jersey shore, then, according to the construction placed upon the act by the lower court, it is impossible for the Trustee to apply to the United States District Court of New Jersey for a summary order, but he must resort to the slow process of a writ of replevin, involving ordinarily the giving of a bond and a trial before a court and jury. To go further, however, in many cases, as in the case at bar, the physical whereabouts of the property sought to be recovered by the Trustee, or the identity of the person in whose possession it is, may be open to question, in which event, of course, an action of replevin would be of no avail. To so construe the act as to make the boundary line of a judicial district the boundary line likewise of summary jurisdiction in bankruptcy is to weaken or frustrate the beneficent purposes of the act, which are to secure to all creditors everywhere equal rights and to protect creditors from fraud and speculation by substituting for the limited powers of the local courts the greater powers of the Federal tribunals, transcending state lines and furnishing adequate protection throughout the Union.

V.

We submit therefore that the order of the District Court of the United States in and for the Southern District of New York should be reversed.

WILLIAM B. HORNBLOWER,
MORGAN M. MANN,
Of Counsel for Appellant.

United States Supreme Court,

OCTOBER TERM, 1909.

No. 89.

BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of the Randolph-Macon Coal Company,

Appellant,

against

HOWARD DUTCHER, Secretary of Randolph-Macon Coal Company, and JAMES T. GARDINER, President of Randolph-Macon Coal Company,

Appellees.

SUPPLEMENTAL BRIEF FOR APPELLANT.

WILLIAM B. HORNBLOWER,
MORGAN M. MANN,
Of Counsel for Appellant.

C. G. Burgoyne, 72 to 76 Spring Street, New York.

United States Supreme Court,

OCTOBER TERM, 1909.

BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of the Randolph-Macon Coal Company,
Appellant,

AGAINST

HOWARD DUTCHER, Secretary of the Randolph-Macon Coal Company, and JAMES T. GARDINER, President of the Randolph-Macon Coal Company,
Appellees.

No. 39.

SUPPLEMENTAL BRIEF FOR APPELLANT.

The language of the Act of 1867 and the language of the Act of 1898 are substantially identical as to the jurisdiction of the Bankruptcy Courts—sitting as Courts of Bankruptcy—as will appear by the following comparison :—

Section 1 of the Bankrupty Act of 1867 :

"That *the several District Courts of the United States* be and they hereby are constituted *Courts of Bankruptcy*

Section 2 of the Bankruptcy Act of 1898 :

"That *the courts of bankruptcy* as hereinbefore defined, viz. the *district courts of the United States in the several*

and they shall have *original jurisdiction in their respective districts* in *all matters and proceedings in bankruptcy*, and they are hereby authorized to hear and adjudicate upon the same, according to the provisions of this act. * * *

"And the jurisdiction hereby conferred shall extend- * * *

"*To the collection of all the assets of the bankrupt* * * * and to *all acts, matters and things, to be done under and in virtue of the bankruptcy* until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy."

States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made *courts of bankruptcy*, and are hereby *invested, within their respective territorial limits* as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise *original jurisdiction in bankruptcy proceedings* in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to * * * (7) *cause the estates of bankrupts to be collected*, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; * * * (15) *make such orders*, issue such process, and enter such judgments *in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.*"

Neither the Act of 1867 nor the Act of 1898 expressly confers ancillary jurisdiction upon Courts other than the Court of adjudication.

Neither the Act of 1867 nor the Act of 1898 expressly negatives such ancillary jurisdiction.

The provisions of the two Acts as to jurisdiction of *plenary suits* by Trustees in bankruptcy differ radically, the Act of 1898 prohibiting such suits (except by consent of defendants) in any Court which would not have had jurisdiction of a suit by the bankrupt himself (see Sec. 23*b*).

The provisions as to *summary jurisdiction* or *administrative jurisdiction* in the two Acts are substantially identical and

should receive the same construction. The same reasoning which sustained ancillary jurisdiction of summary proceedings under the Act of 1867 applies equally to the Act of 1898.

Since our brief in this Court was prepared and printed, our attention has been called to two recent decisions on the questions involved, namely *In re Dunseath*, 168 Fed. Rep., 973, and *In re Dempster*, 172 Fed. Rep., 353.

The former decision was rendered March 22, 1909, in the District Court for the Western District of Pennsylvania, by Judge YOUNG. It held that a District Court in a district other than that in which the bankruptcy proceedings are pending, has jurisdiction to appoint an ancillary receiver to take possession of property in such district belonging to the bankrupt, pending adjudication. The learned Judge cites as authority *Lathrop vs. Drake*, 91 U. S., 516, which approves the opinion of Mr. Justice CLIFFORD in *Sherman vs. Bingham*, Fed. Cas., 12,762 arising under the Act of 1867, and the learned Judge proceeds:

> "The reasons for this decision are equally applicable to the present bankruptcy act. * * * Our present bankruptcy act, being a system of law enacted for the purpose of establishing a uniform system for the adjustment of insolvent estates throughout the Union, is not only to be construed in the light of other bankruptcy acts heretofore enacted in this country, but is *to be construed with such liberality as will make the system effective* in the collection, preservation and distribution of estates. * * * Is the act regulating this system to be so interpreted that, while it only allows the court of the domicile to take into its grasp assets within its territorial boundary, and forbids it to enter by its accredited officer another co-ordinate court, it will also stay the arm of every other court beyond its territorial boundary from aiding or assisting it in doing that for which the law was enacted? Rightly interpreted, we believe the *true doctrine is that this is an effective national system* of administering insolvent estates, giving to the court of the domicile full power to administer the estate, and *giving to other courts of like jurisdiction beyond the boundary of the primary court full authority to*

> *aid by its decrees and processes that primary court*, so that all the essets of the bankrupt may be at last brought into the primary court for distribution. We *believe the authority of the District Courts of sister jurisdictions is auxiliary and ancillary for the purpose of making the act effective.*"

The other case is *In Re Dempster*, 172 Fed. Rep., 353, decided July 26, 1909, which is a decision of the Circuit Court of Appeals for the Eighth Circuit. The Court in that case disapproved of the rulings made in the *Peiser* case, the *Sutter* case and the *Dunseath* case, and holds that if the property of the bankrupt is outside of the district where the bankruptcy proceedings are initiated, the trustee must bring a plenary suit in order to recover such assets, and that the only Court in which he can proceed by petition or motion, is the court in which the proceeding is originally instituted.

The consequences of this ruling are, that if any of the property of the bankrupt is held by an agent of the bankrupt in a district other than that in which the bankruptcy proceedings are initiated, the trustee, in order to obtain such property, must bring a plenary suit in the nature of a replevin suit, even though there is no pretense of any adverse claim, but simply a withholding of the property from the trustee by the person in possession thereof. The bringing of a replevin suit necessitates, of course, the giving of a bond to the sheriff and the trial of the suit before a court and a jury with the usual delays incident to such litigation. Such a suit would have to be brought in a state court under the statute, except where the Circuit Court of the United States would have had jurisdiction as between the bankrupt and the defendant on the ground of adverse citizenship (See *Bardes vs. Hawarden Bank*, 178 U. S. 524).

We respectfully submit that any construction of the Bankruptcy Act, which compels the trustee to resort to a plenary suit to recover the *admitted assets* of the bankrupt should not be accepted by this Court, unless the language of the statute is too plain to admit of any other construction.

While it must be conceded that the decision in the *Matter of Dempster* is an authority adverse to the claim made by the appellant in this case, it is by no means clear that the two

previous decisions in the Circuit Court of Appeals relied upon by the appellee are authorities against us.

In order to avoid confusion in examining the authorities under the Act of 1898, it is necessary to bear in mind that there are two classes of cases coming before the courts for consideration, and that the principles applicable to those two classes of cases under the Act of 1898 are entirely different. The first class of cases is where there is a *claim of adverse title* to property of the bankrupt, based upon a *transfer antedating the bankruptcy*. The other class of cases is where there is *no claim of adverse title based on any transfer prior to the bankruptcy*, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy.

In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated

In the latter class of cases it is not necessary to bring a plenary suit, but the Bankruptcy Court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a litigation.

The former class of cases falls within the ruling in the case of *Bardes vs. Howarden Bank*, 178 U. S., 524, and in the case of *Jaquith vs. Rowley*, 188 U. S., 620, which hold that such a suit can be brought only in a court which would have had jurisdiction of a suit by the bankrupt against the adverse claimant, except where defendant consents to be sued elsewhere.

In the latter class of cases a plenary suit is not necessary. This latter class of cases falls within the rule laid down in *Bryan vs. Bernheimer*, 181 U. S., 188 and *Mueller vs. Nugent*, 184 U. S., 1, which held that the Bankruptcy Court can act summarily. The Court did not, however, in these cases discuss the question as to whether a court, other than the court of adjudication, could exercise this summary jurisdiction.

The precise question before the Court in the present appeal is whether, in a case in which the original Court of Bankruptcy could act summarily, another Court of Bankruptcy sitting in

another district can act summarily in aid of the Court of original jurisdiction.

The two decisions by the United States Circuit Court of Appeals, which have heretofore been cited as controlling authorities against us on this question are not in point, when examined in the light of the distinction just pointed out between the two classes of cases. Thus, in *In re Von Hartz*, 142 Fed. Rep., 726, decided by the United States Circuit Court of Appeals for the Second Circuit in December, 1905, which the learned Judge below (Judge HOLT) in the case at bar assumed to be decisive against his jurisdiction and in deference to which he abandoned the position which he himself had previously taken in the case of *In re Sutter Brothers*, 131 Fed. Rep., 654, is not, we submit, a controlling authority against ancillary jurisdiction in summary proceedings. It appears from the statement of the case in the opinion of the Court in the Von Hartz case, that the proceeding before the Court was a summary application, in which the appellant had been directed to turn over to the trustee in bankruptcy a *policy of life insurance* upon the life of the bankrupt, which "*had theretofore been assigned by Von Hartz to appellant.*" It is not stated in the opinion whether the assignment was prior to or subsequent to the proceedings in bankruptcy. If prior to such proceedings then it is clear that neither the Court where the bankruptcy proceedings were pending, nor any other Court could grant a summary order disposing of the title of the adverse claimant, claiming title to the policy by assignment; the title could only be determined in a plenary suit and would fall within the ruling in the *Bardes* case and in the *Jaquith* case, *supra*. If, however, the assignment was subsequent to the bankruptcy proceedings, then it would be a nullity and would be disregarded by the bankruptcy court, and possession could be given to the trustee by a summary order, as in the *Bryan* case and the *Mueller* case, *supra*.

So also in *Hull vs. Burr*, U. S. Cir. Ct. of App., 5th Cir., 153 Fed. Rep., 945, the question was clearly one which could only be determined in a *plenary suit* brought by the trustee in bankruptcy. It could not be determined in any Court (even in the Court of primary jurisdiction, the Court of adjudication) by summary proceedings. It was a case where the property

was claimed under a *conveyance by the bankrupt more than four months prior to the bankruptcy. The ground for recovery was that the conveyance was in fact a mortgage.*

We refer the Court to the opinions of the District Judges in favor of the ancillary jurisdiction of the District Courts:

In re Peiser (E. D. Penn. 1902, McPherson, J.), 115 Fed. Rep., 199.

In re Sutter Bros. (S. D. of N. Y. 1904, Holt, J.), 131 Fed. Rep., 654.

In re Benedict (E. D. Wisc. 1905, Quarles, J.), 140 Fed. Dep., 55.

In re Nelson (S. D. N. Y. 1907, Hough, J.), 149 Fed. Rep., 590.

There is no decision of this Court adverse to the ancillary jurisdiction of the District Courts.

The decisions of this Court are as follows, stated in their chronological order:

Bardes vs. Hawarden Bank, 178 U. S., 524. This was an appeal from the District Court for the Northern District of Iowa. It was a plenary suit in equity, brought by the trustee in bankruptcy of one Walker to set aside a conveyance of goods made by the bankrupt within four months before the proceedings in bankruptcy, on the ground that the conveyance was in fraud of the Bankruptcy Act and in fraud of the creditors of the bankrupt. This Court held that the provisions of the second clause of Section 23 of the Bankruptcy Act of 1898, limit the jurisdiction of *all Courts*, including the District Courts of the United States, over suits brought by trustees, and that the District Courts cannot, except by the consent of the defendant, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers made by the bankrupt to third parties before the institution of the proceedings in bankruptcy. Section 23*b* provides:

> "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by the trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

In this case it was clear that the bankrupt himself could not have sued the defendants in the District Court of the United States, which would have had no jurisdiction whatever of any such suit; consequently, the trustee could not bring suit in the District Court. It is also clear that the District Court would have had no jurisdiction to make a summary order determining the title to the property in question.

The Court distinguishes the case of *Lathrop vs. Drake*, 91 U. S., 516, arising under the Act of 1867, on the ground that by the language of that Act the jurisdiction of the District and Circuit Courts over suits to recover assets of the bankrupt from a stranger to the proceeding in bankruptcy, was expressly conferred by Section 2 of that Act, which gave to those two Courts concurrent jurisdiction of all suits at law or in equity, brought "by the assignee in bankruptcy against any person *claiming an adverse interest*, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee." That Act contained no such restrictive provision as is contained in Subdivision *b* of Section 23 of the Act of 1898. The opinion of the Court (at page 532) calls attention to the distinction already referred to between the right on the one hand of a Trustee in bankruptcy to assert a title "in property *transferred* by the bankrupt *before the bankruptcy to a third person*" who claims it *adversely* to the trustee, which right can only be enforced by a plenary suit at law or in equity, and the right on the other hand of a trustee in bankruptcy by summary proceedings to assert title to property of the bankrupt *not claimed* under an *adverse title* by reason of a transfer prior to the bankruptcy.

This Court did not pass upon the question of whether any Court, other than the Court of primary jurisdiction (that is, the Court of adjudication of bankruptcy), would have ancillary jurisdiction to make summary orders with regard to the property of the bankrupt *not claimed adversely*.

White vs. Schloerb, 178 U. S., 542. This case came up on certificate from the Circuit Court of Appeals for the Seventh Circuit. This Court held that after an adjudication in bankruptcy an action of replevin in a State Court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the

time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun; and the District Court of the United States, sitting in bankruptcy, has jurisdiction by summary proceedings to compel the return of the property seized. The grounds of the action of replevin were that the bankrupts had purchased and obtained the goods by false and fraudulent representations, and that before suing out the writ of replevin the plaintiffs had elected to rescind the sale and had demanded of the bankrupts a return of the goods. At the date of the adjudication of bankruptcy, the goods were in the store of the bankrupts and in their actual possession and were claimed by them as their property. This Court held that under the circumstances the goods were in the custody of the United States Court and could not be taken out of that custody upon any process from the State Court, and this Court concludes as follows (at page 547):

> "Not going beyond what the decision of the case before us requires, we are of opinion that the judge of the court of bankruptcy was authorized to compel persons, who had forcibly and unlawfully seized and taken out of the judicial custody of that Court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody; and, therefore, our answer to the first question must be: '*The District Court* sitting in bankruptcy had jurisdiction by *summary proceedings* to compel the return of the property seized."

The question of ancillary jurisdiction was not considered in this case.

Bryan vs. Bernheimer, 181 U. S., 188. This was a case brought up by *certiorari* to the Circuit Court of Appeals for the Fifth Circuit. The question was as to the authority of the District Court for the Middle District of Alabama as a Court of Bankruptcy to make a summary order directing the marshal of the district to take immediate possession of property of the bankrupt in the hands of a third party. It appeared that the bankrupt, nine days before the filing of a petition in bankruptcy against him, made a general assignment for

the benefit of his creditors, which was an act of bankruptcy. After the filing of the petition in bankruptcy the assignee sold the property. After the adjudication in bankruptcy and before the appointment of a trustee, the petitioning creditors applied to the District Court for an order to the marshal to take possession of the property, alleging that this was necessary for the interest of the bankrupt's creditors. The Court ordered that the marshal take possession and that notice be given to the purchaser to appear in ten days and propound his claim to the property, or, failing to do so, be decreed to have no right in it. The purchaser came in and propounded a claim, stating that he bought the property for cash in good faith of the assignee. This Court held that the purchaser had no title in the property superior to the bankrupt's estate, and that the equities between him and the creditors should be determined by the District Court, bringing in the assignee, if necessary. This Court says (on page 194):

> "*The present case involves no question of jurisdiction over a suit by a trustee against a person claiming an adverse interest in himself.*"

The Court held in effect that the purchaser from the general assignee, having purchased *subsequent to the bankruptcy proceedings*, was not a third party claiming under an adverse title, the Court saying:

> "Considering that the property was not held by Davidson under any claim of right in himself, but under a general assignment, which was itself an act of bankruptcy; that no trustee had been appointed; that the sale by Davidson to Bernheimer was made after and with knowledge of the petition in bankruptcy; and that Bernheimer consented to the form of proceeding; we are of opinion that Bernheimer had no title superior to the title of the bankruptcy estate; that the District Court as a Court of Bankruptcy, was authorized so to decide in this proceeding; and that the decree of the Circuit Court of Appeals, directing the goods to be restored to Bernheimer must be reversed."

No question arose in this case as to the ancillary jurisdiction of the District Court of any other district than the district where the bankruptcy proceedings were instituted.

Mueller ex. Nugent, 184 U. S., 1. This case came up by *certiorari* to the Circuit Court of Appeals for the Sixth Circuit. This Court held that the Bankruptcy Court has power to compel the surrender of money or other assets of the bankrupt in his possession, or that of some one for him, on a petition and rule to show cause, and that the filing of a petition in bankruptcy is a *caveat* to all the world, and in effect an adjudication and injunction, and on adjudication and qualification of the trustee the bankrupt's property is placed in the custody of the bankruptcy court and title becomes vested in the trustee, and that the refusal to surrender property of the bankrupt does not in itself create an adverse claim at the time the petition is filed.

The opinion of the Court in this case was delivered by Mr. Chief Justice FULLER. The Court say (at page 14):

> "In other words, the question reduces itself to this: Has the Bankruptcy Court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? *Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit* in the Circuit Court or a State Court, as the case may be? If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient. *The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness or a conversion, or to proceedings in chancery*, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law."

And again at page 15:

> "The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact and therefore an adverse claim when the petition was filed, and to that we cannot give our assent.
>
> "But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, *the bankruptcy court had the power to ascertain whether any basis for such a claim actually existed* at the time of the filing of the petition. The Court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction, while its conclusion might have been that *an adverse claim, not merely colorable, but real* even though fraudulent and voidable, existed in fact, and also that it must decline to finally adjudicate on the merits."

The question of ancillary jurisdiction was not passed upon in this case.

Jaquith vs. Rowley, 188 U. S., 620. This was an appeal from the District Court of the United States for the District of Massachusetts. It was held by this Court that one who received money to indemnify him for giving bail bonds for a person subsequently and more than four months thereafter adjudicated a bankrupt, holds such money as an adverse claimant within the meaning of Section 23*a* and *b* of the Bankruptcy Act of 1898, and the District Court of the United States does not have jurisdiction in a summary proceeding on the petition of the trustee to compel him to turn such money over to the trustee in bankruptcy. The Court say, per Mr. Justice PECKHAM (at page 623):

> "The surety in whose hands the money was deposited to indemnify him for his liability on the bail bond was an adverse claimant within the meaning of that section of the act, and could not be proceeded against in the bankruptcy court unless by his consent, as provided for therein. It is not necessary in order to

be an adverse claimant that the surety should claim to be the absolute owner of the property in his possession. It is sufficient if, as in the present case, the money was deposited with him to indemnify him for his liability upon the bail bond and that liability had not been determined and satisfied. If the trustee desire to test the question of the right of the surety to retain the money he must do so in accordance with the provisions of the section of the bankrupt law above referred to."

The Court referred to the previous decision in *Mueller vs. Nugent, 184 U. S.*, 1, which held that where an agent held money belonging to the bankrupt, to which he made no claim, but simply refused to give up the property which he acknowledged belonged to the bankrupt, the Bankruptcy Court had power by summary proceedings to order him to deliver such property to the trustee in bankruptcy. The Court say (page 625):

> "The case before us is wholly different. The surety claims the right to hold the money as against everybody until his liability on the bail bond is satisfied, and that claim is adverse to any claim that the trustee may make upon him for the money which is to indemnify him as stated. * * *
>
> "If the trustee has the right to obtain possession of the money from the surety, he must assert it in accordance with the provisions of section 23 of the bankruptcy act and not by this summary proceeding in bankruptcy."

The question of ancillary jurisdiction did not arise in this case.

In re Wood and Henderson, 210 U. S., 246. This case came to this Court by certificate from the Circuit Court of Appeals for the Eighth Circuit. The opinion was delivered by Mr. Justice DAY. The question before this Court was with regard to the jurisdiction under Section 60*d* of the Bankruptcy Act to re-examine on petition of the trustee, the validity of a payment or transfer made by the bankrupt in contemplation of bankruptcy, to an attorney for legal

services to be rendered by him and to ascertain and adjudge what is a reasonable amount to be allowed for such services and to direct repayment of any excess to the trustee and to make service of notice on such attorney outside of the District. This case did not involve any question of the general power of the bankruptcy court to make summary orders with regard to the property of the bankrupt, nor did it involve any question of ancillary jurisdiction. This Court say:

> "Section 60*d* is *sui generis*, and does not contemplate the bringing of plenary suits or the recovery of preferential transfers in another jurisdiction."

And again (on page 258):

> "This section in effect confers a *special jurisdiction* in a bankruptcy proceeding; it is only available when property has been transferred in contemplation of the filing of a petition in bankruptcy. When the affairs of one about to be adjudicated a bankrupt are in that situation, then the act, recognizing the right of the bankrupt to legal services to be rendered, undertakes to prevent the diminution of the estate to be administered and distributed for the benefit of creditors beyond a fair provision for counsel under such circumstances. To the extent that the provision is unreasonable the transfer is not given the effect to separate the property from the bankrupt's estate. As to this excess, the estate comes, within the meaning of the bankruptcy act, within the jurisdiction of the court, and will be ordered to be restored and administered for the benefit of creditors. The order contemplated can only be made after reasonable notice, which the facts certified in this case show was given to the petitioners".

There was a dissenting opinion in this case by Mr. Justice BREWER, concurred in by Mr. Justice PECKHAM and Mr. Justice MOODY, in which they held that Section 60*d* did not authorize summary proceedings to recover a preference, even where it involved the liability of counsel receiving payment in advance, but that a plenary suit should be brought.

It thus appears from a review of the previous decisions of this Court that the question is still an open one as to the ancillary jurisdiction of the District Courts in summary proceedings in cases where such summary proceedings are proper in the Court of primary jurisdiction.

WM. B. HORNBLOWER,
MORGAN M. MANN,
Of Counsel.

United States Supreme Court,

OCTOBER TERM, 1909.

No. 39.

BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of the Randolph-Macon Coal Company,

Appellant,

against

HOWARD DUTCHER, Secretary of Randolph-Macon Coal Company, and JAMES T. GARDINER, President of Randolph-Macon Coal Company,

Appellees.

BRIEF IN REPLY TO APPELLANT'S SUPPLEMENTAL BRIEF.

HENRY W. TAFT,

Of Counsel for Appellees.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

Supreme Court of the United States,

OCTOBER TERM, 1909, No. 39.

BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of the Randolph-Macon Coal Company,
Appellant,

AGAINST

HOWARD DUTCHER, Secretary of Randolph-Macon Coal Company, and JAMES T. GARDINER, President of Randolph-Macon Coal Company,
Appellees.

Brief in Reply to Supplemental Brief for the Appellant.

In reply to the Supplemental Brief for the appellant, we desire to call the attention of the Court to two points, viz.:

1. At page 6 of the Supplemental Brief it is suggested that in the case of *In re Von Hartz*, 142 Fed. Rep., 726, the policy of insurance which was the subject of the application there under consideration might have been transferred by the bankrupt prior to the commencement of the bankruptcy proceedings and that the case would thus be distinguished from the case at bar. In support of this supposition a statement in the opinion of the Court is referred to that the assignment of the policy had been made before the summary direction of the Court to turn it over to the trustee in bankruptcy. If the assumption of the appellant were correct the holder of the policy would have been an adverse claimant and could not, even in the bankruptcy court in which the pro-

ceedings were pending, be compelled by a summary order to turn over the policy to the trustee. The basis for the argument of the appellant is destroyed by an inspection of the record on appeal in the *Von Hartz* case, which shows that the adjudication in bankruptcy took place on July 13, 1904, that the trustee was appointed on August 8, 1904, and that the policy in question belonged to and was in the possession of the bankrupt at the date of the adjudication and was not assigned until September, 1904. It is clear, therefore, that no question arose as to whether or not the assignee of the policy was a holder under a claim of adverse title. The sole question litigated was whether the District of the United States for the Southern District of New York had ancillary jurisdiction in a summary proceeding, and it was held that no such jurisdiction existed.

2. The decision in the *Dempster* case, 172 Fed. Rep. 353, adds decided weight to the authorities in favor of the contention of the appellees. It is the third decision of a Circuit Court of Appeals substantially to the same effect.

In that case the bankrupt was a corporation organized under the laws of the State of New York and was adjudicated a bankrupt in the District Court for the Southern District of that State. A receiver in bankruptcy was appointed who was authorized to continue the business of the bankrupt. Prior to the filing of the petition in bankruptcy, Dempster, a judgment creditor, obtained a judgment against the bankrupt in a court of the State of Missouri, the principal place of business of the bankrupt and where it had owned a lead mine and machinery. Dempster caused execution to be issued and a levy to be made upon the bankrupt's property. A sale upon execution was advertised, whereupon certain creditors and the receivers presented a petition in the District Court for the Eastern District of Missouri setting forth the facts above stated. The petition was a summary proceeding by which the petitioner prayed for the appointment of an ancillary receiver and for an injunction restraining Dempster from proceeding upon the sale on execution. The bankrupt appeared by counsel and consented to the order prayed for, but neither Dempster nor the Sheriff was served with notice. An *ex parte* order in accordance with the prayer of the petition was made. Demp-

ster applied to vacate the order upon the ground that it was made without jurisdiction. The Court held that the proceeding in the District Court was *coram non judice*, and added, at page 355 :

> " The court in which the petition is filed has plenary " jurisdiction in bankruptcy throughout the United " States. Within that limit all the estate in the pos- " session of the bankrupt or held by another as his " property is brought immediately within the custody " of the court and made subject to its protection. The " filing of the petition is an attachment of the estate, " and an injunction restraining any act which will inter- " fere with its administration in bankruptcy. This " jurisdiction is national, and takes no account of dis- " tricts or states."

The Court further holds that any proceeding in a district other than that where the adjudication was had must be a " plenary action at law or suit in equity," and that as there was no such proceeding pending in the Eastern District of Missouri, the Court was without jurisdiction to proceed upon motion.

The Court then proceeds as follows :

> " It does not follow, from what we have said, that " the parties in interest here were without remedy. The " authority of the bankruptcy court to appoint a re- " ceiver for the preservation of the estate pending the " adjudication, to authorize the receiver temporarily to " conduct the business of the alleged bankrupt, and to " make all orders necessary for the accomplishment of " those objects, applies to the entire estate of the bank- " rupt, wheresoever it may be situated in the United " States, and is not confined to such property as may be " within the district wherein the petition in bankruptcy " is filed. In short, the authority to take precautions " for the preservation of the estate pending the adju- " dication in bankruptcy is quite as broad, terri- " torially speaking, as is the authority to collect, " administer, and settle the estate after a trustee " is appointed. Section 2, cl. 3, of the bank-

" ruptcy act (Act July 1, 1898, c. 541, 30 Stat. " 545 [U. S. Comp. St., 1901, p. 3421]), authorizes the " court to appoint receivers 'for the preservation of " estates, to take charge of the property of bank- " rupts.' Wherever the estate is in the United States, " there this jurisdiction extends. In its exercise the " court may authorize the re eiver to take possession " of property belonging to the estate wherever situ- " ated, and restrain third parties from interfering with " that possession, and may also restrain them from " pursuing remedies in other courts which will con- " flict with the duties of the receiver. In the recent " case of *In re Muncie Pulp Co.*, 151 Fed., 732, 81 C. " C. A., 116, the Circuit Court of Appeals of the Second " Circuit held that a court of bankruptcy in the " Southern District of New York had power to " authorize its receiver to take possession of real prop- " erty belonging to the estate in Arkansas, and to " restrain creditors residing in that state from prose- " cuting actions in its courts by attachment against " the property. Upon the authority of that case, " the court of New York in the instant case " had jurisdiction to restrain the execution " sale now under consideration by specific order. If " the pendency of that sale was not discovered by the " receiver until he reached the state of Missouri, and at " a time when it would have been too late to apply to " the court of his appointment, there were still several " courses open to him: (1) He might have applied to " the state court out of which the execution issued to " restrain further proceedings thereon, and it would " have been the imperative duty of that court, under sec- " tion 11 of the bankruptcy act, to grant the relief. (2) " The sheriff held the property as the property of the " bankrupt. Otherwise there would have been no " foundation for his levy. *Clarke v. Larremore*, 188 " U. S., 486, 23 Sup. Ct., 363, 47 L. Ed., 555. In this " case the Supreme Court decided that money arising " from an execution sale of the property of the bank- " rupt, while in possession of the officer making the " sale, could be arrested and reclaimed by the trustee.

"Much more could property which is simply held under "a levy be recovered on behalf of the estate. "Holding the property as the property of the "bankrupt, it would have been the duty of the sheriff, "upon demand of the receiver, to acknowledge his "right and suspend further proceedings under the "writ. Any priorities which the creditor secured by "the levy would have been fully protected in the court "of bankruptcy. (3) If the state authorities had re- "fused to accede to the requests of the receiver, he "could have filed a plenary suit to enforce his right to "the possession of the property and to restrain its dis- "sipation and waste by the execution sale. It would "seem that the United States Circuit Court would "have jurisdiction of such a cause as a suit arising "under the laws of the United States, within the mean- "ing of the judiciary act. The limitations of section "23 of the bankruptcy law relate only to suits brought "by trustees, and do not apply to suits by receivers."

The Court then says that while it is true that the collection of the estate is the function of the trustee, "its preservation pending the election of a trustee is the duty of the receiver," and that to perform this duty his powers most necessarily be broader even than those of the trustee. It adds: "When "necessary for its preservation, the court may direct him (the "receiver) to take possession of property, although the same is "held adversely under a claim of right—property so situated "that the trustee could only recover it by a plenary action." *Bryan vs. Bernheimer*, 181 U. S., 188, and *Sharpe vs. Doyle*, 102 U. S., 686, are referred to in support of this proposition.

The Court then proceeds:

"Peculiar circumstances might also exist, owing to "the great distances in this country and the wide dis- "tribution of estates, in which it would be impossible "for the receiver to apply to the court of his appoint- "ment to enforce the delivery of possession of prop- "erty belonging to the estate against persons refusing "to acknowledge his rights, and when the property

> " would be dissipated and the estate suffer irreparable
> " loss unless prompt relief could be obtained. In such
> " a case the receiver could, in our judgment, maintain
> " any action or suit necessary for the protection of the
> " estate. The authorities which hold that a receiver in
> " bankruptcy has no power to seize property or
> " maintain suits for the protection of the estate
> " outside the district of his appointment confuse such
> " a statutory receiver with the ordinary receiver
> " in chancery. A receiver of the latter class derives
> " all his powers from the order appointing him,
> " and is confined to the jurisdiction of the
> " court from which it emanates. A receiver in bank-
> " ruptcy, on the contrary, not only derives his powers
> " from the statute, but the jurisdiction of the court
> " appointing him, as already explained, is as to such
> " receiverships, coextensive with the United States.
> " This distinction is clearly recognized in *Booth v.*
> " *Clark*, 17 How. 322, 334, 15 L. Ed. 164; *Hale v.*
> " *Allinson*, 188 U. S. 56, 68, 23 Sup. Ct. 244, 47 L. Ed.
> " 380. While such a receiver acts at all times under
> " the supervision of the court, his authority to maintain
> " suits for the protection of the estate need not be ex-
> " pressly granted. It would spring by implication from
> " the nature of his duties."

This case, therefore, broadly holds that a Receiver in bankruptcy for the purpose of the preservation of the estate may, without reference to the restrictions placed by Section 23 upon suits to be brought by the Trustee, proceed to bring a suit in any State of the United States and procure any provisional remedy which may be necessary for the preservation of the estate. If the Court is to construe the Bankruptcy Act so as to furnish a uniform and effective system of bankruptcy, here is a method pointed out by giving to the words " for the preservation of estates " an entirely natural though comprehensive meaning. The difficulties of spelling out of the general language an intention to confer upon distant courts *ancillary* jurisdiction for the appointment of receivers and for the issuance of injunction orders upon the application of any person who may be interested in

the estate, are thus avoided; and such jurisdiction as may be necessary for the preservation of the estate, is implied, to be exercised at the instance of the receiver appointed by the Court which has made the adjudication; and thus a harmonious policy in the administration of the estate is assured. If, on the other hand, *ancillary* jurisdiction is to be implied from the provision imposing on the receivers the duty to preserve the estate, it may well be that an administration conducted by a number of ancillary receivers in different parts of the country, each under the direct supervision of the Court which appointed him, would not be uniform, harmonious or effective in preserving the estate of the bankrupt. The interpretation of the act given by the Court in the *Dempster* case would avoid the inconveniences which finally led the courts under the acts of 1841 and 1867 to hold that ancillary jurisdiction was to be implied from the general language of those acts. Under those acts no such officer as the receiver was provided for and there is nothing in any of the earlier decisions to prevent the Court from implying from the language of the act of 1898 that the broadest possible jurisdiction was intended to be conferred for the preservation of the estate. We respectfully submit that the Circuit Court of Appeals has in the *Dempster* case pointed out an entirely permissible interpretation to be given to the act which will result in a "uniform system of bankruptcy national in its character," and which will be "in harmony with the scope and design of the act."

HENRY W. TAFT,
Of Counsel for Appellees James T. Gardiner and Howard Dutcher,
40 Wall Street,
New York City.

United States Supreme Court,

OCTOBER TERM, 1909.

No. 39.

BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of the Randolph-Macon Coal Company,

Appellant,

against

HOWARD DUTCHER, Secretary of Randolph-Macon Coal Company, and JAMES T. GARDINER, President of Randolph-Macon Coal Company,

Appellees.

BRIEF FOR APPELLEES.

HENRY W. TAFT,
Of Counsel for Appellees.

C. G. BURGOYNE, 72 to 76 Spring Street, New York.

Supreme Court of the United States,

OCTOBER TERM, 1909, NO. 39.

BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of the RANDOLPH-MACON COAL COMPANY,
Appellant,

AGAINST

HOWARD DUTCHER, Secretary of RANDOLPH-MACON COAL COMPANY, and JAMES T. GARDINER, President of RANDOLPH-MACON COAL COMPANY,
Appellees.

BRIEF FOR APPELLEES.

The question arises in this case whether a District Court can at the instance of a trustee in bankruptcy appointed by a District Court for another district compel by summary process the delivery of books claimed to be, and to relate to, the property of the bankrupt. Two questions are presented, viz: *first*, whether a District Court, as a Court of Bankruptcy, has ancillary jurisdiction to entertain a summary proceeding in aid of bankruptcy proceedings instituted in a district other than its own, and *second*, whether there is any real dispute as to title to the books which the trustee seeks to recover which cannot be adjudicated except in a plenary action brought for the purpose.

The contention of the appellee in the District Court was that stock certificate books and stock ledgers did not relate to the *property* of the *corporation* but to the proportionate shares or interests therein of the *stockholders*. In respect to the minutes, it was contended that they were kept solely for the convenience of the directors and stockholders and were not "documents relating to" the property of the corporation. Appellees also denied the appellant's title to the books in question (Record, fol. 13). These were the grounds of the refusal of the appellees to deliver the books in question to the appellant.

With these modifications we are satisfied with our opponent's statement of facts.

POINT I.

A District Court has no ancillary jurisdiction on the application of a trustee in bankruptcy appointed by another District Court to compel by summary order the delivery to him of property of the bankrupt.

There has been some conflict in the decisions under the Act of 1898 as to the ancillary jurisdiction as a court of bankruptcy of a District Court in a district other than that where a bankruptcy proceeding is pending, but the decided weight of authority does not sustain such jurisdiction. Under the Acts of 1841 and 1867, however, it was generally held that such jurisdiction did exist. There are only four decisions under the Act of 1898 which upholds such jurisdiction. One is the decision of District Judge HOLT in the Southern District of New York (*In re Sutter Brothers*, 131 Fed. Rep., 654)

holding that ancillary jurisdiction existed to grant a creditor's application for the examination of witnesses in a district other than that where the adjudication in bankruptcy was rendered. But the same Judge was obliged in the case at bar, upon the authority of the decision of the Circuit Court of Appeals for the Second Circuit, in *In re Von Hartz* (142 Fed. Rep., 726), to abandon the position he took in the *Sutter* case and hold that such ancillary jurisdiction did not exist. Another decision is that of District Judge YOUNG, of the Western District of Pennsylvania, in *In re Dunseath & Son Co.* (168 Fed. Rep., 973), which is deprived of weight as an authority by the fact that, although it is the latest decision upon the question, the Court either overlooked or ignored two previous decisions of the Circuit Court of Appeals (*In re Von Hartz*, 142 Fed. Rep., 726, in the Second Circuit, and *Hull vs. Burr*, 153 Fed. Rep., 945, in the Fifth Circuit) in both of which a different conclusion was reached.

In re Peiser, 115 Fed. Rep., 199, should also be noted. A receiver appointed by the District Court for the Southern District of New York had obtained an order adjudging a Trust Company in Philadelphia in contempt for refusing to pay to the receiver funds belonging to the bankrupt as directed by order of Court. The District Court for the Southern District of New York directed its receiver to apply to the District Court for the Eastern District of Pennsylvania for assistance in enforcing the orders of District Court for the Southern District of New York. On the application of the receiver pursuant to this direction to the District Court for the Eastern District of Pennsylvania an order to pay over the money or to show cause was granted by District Judge MCPHERSON. He, however, wrote no opinion and the decision was no doubt based largely upon the fact that the application was made pursuant to the direction of the District Court for the Southern District of New York.

The only other decision which sustains the ancillary jurisdiction in bankruptcy of District Courts is *In re*

Benedict, 140 Fed. Rep., 55, and this will be referred to more fully below.

In *re Von Hartz, supra*, the Circuit Court of Appeals for the Second Circuit (the Court consisting of LACOMBE, TOWNSEND and COX, Circuit Judges), held that in an involuntary bankruptcy proceeding instituted in the District of New Jersey, the District Court for the Southern District of New York had no jurisdiction to make an order summarily directing a person to turn over to a trustee in bankruptcy a policy of life insurance upon the life of the bankrupt, which had been assigned to the person against whom the proceeding was directed. The decision of the Court was based upon the decisions *In re Williams*, 120 Fed. Rep., 38, and *In re Williams*, 123 Fed. Rep., 321, both referred to below, the Court stating that it concurred with the reasoning of the Court in those two cases.

In *Hull vs. Burr, supra*, it was held by the Circuit Court of Appeals for the Fifth Circuit that a District Court was without jurisdiction in a suit by a trustee in bankruptcy appointed in another district to recover property from one to whom it was conveyed by the bankrupt more than four months prior to the bankruptcy and who took possession of it after the bankruptcy. The Court considered the petition in several aspects and, among others, as a *summary proceeding* in bankruptcy to obtain possession of property withheld. The application was made in the Northern District of Florida, the bankrupt having been a corporation whose bankruptcy had been adjudicated in the United States District Court for the State of Massachusetts. Counsel cited cases construing the Bankruptcy Acts of 1841 and 1867, but the Court held that these were inapplicable "because each of those acts contained a provision conferring on the Circuit and District Courts of the United States concurrent jurisdiction of suits at law and in equity between the assignee in bankruptcy and an adverse claimant of the property of the bankrupt. The Act of 1898 contains no such provision."

The Court then proceeds :

> " We find no provision of the act which ex-
> " pressly or impliedly makes provision for sum-
> " mary proceedings or for auxiliary or ancillary
> " proceedings in another court of bankruptcy in
> " aid of the bankruptcy court that made the adju-
> " dication and has charge of the bankrupt's estate.
> " Congress, of course, could have adopted a
> " scheme by which every District Court would be
> " charged with the collection or administration of
> " the bankrupt's property in aid of or ancilliary to
> " the jurisdiction of the court of adjudication,
> " but we find in the act no hint of such intention.
> " On the contrary, the act limits the jurisdiction
> " of the bankruptcy courts, including even the one
> " of adjudication, by providing that suits by the
> " trustee—with the exceptions we have noted—
> " shall only be brought or prosecuted in the courts
> " where the bankrupt whose estate is being ad-
> " ministered by such trustee might have brought
> " or prosecuted them if proceedings in bankruptcy
> " had not been instituted.
>
> " We are of opinion that the District Court
> " erred in overruling the plea to the jurisdiction."

In re Williams, 120 Fed. Rep., 38, was the first decision under the act of 1898 on the subject of ancillary jurisdiction. This case was decided in the Eastern District of Arkansas in 1903, by District Judge TRIEBER. He said :

> " Bankruptcy courts, like all other national
> " courts, although not courts of inferior jurisdic-
> " tion, are courts of limited jurisdiction. They
> " are creatures of the statute, and possess no pow-
> " ers except those conferred upon them either ex-
> " pressly or by necessary implication. The juris-
> " diction of the district courts as courts of bank-
> " ruptcy is to be found in section 2 of the bank-

" ruptcy act (U. S. Comp. St. 1901, p. 3420). The
" provisions applicable to this case, and which are
" invoked by learned counsel, are as follows:

" 'That the courts of bankruptcy * * *
" ' are hereby invested within their respective
" ' territorial limits * * * with such juris-
" ' diction at law and in equity as will enable
" ' them to exercise original jurisdiction in bank-
" ' ruptcy proceedings, in vacation in chambers
" ' and during their respective terms, as they are
" ' now or may be hereafter held, to— '

" And then enumerates 19 subjects, among
" them subdivision 7 (U. S. Comp. St. 1901, p.
" 3421), which is as follows:

" ' Cause the estates of bankrupts to be col-
" ' lected, reduced to money and distributed, and
" ' determine controversies in relation thereto,
" ' except as herein otherwise provided.'

" And subdivision 15:

" ' Make such orders, issue such process, and
" ' enter such judgments in addition to those
" ' specifically provided for as may be necessary
" ' for the enforcement of the provisions of this
" ' act.'

The Court then points out the difference in the provisions of the Act of 1898 and of 1867, and proceeds:

" The issues in this case are therefore reduced
" to the simple proposition whether a bankruptcy
" court of a district other than that in which the
" proceedings are pending has jurisdiction to
" grant an injunction to protect the assets of the
" bankrupt, and aid the bankruptcy court in
" which the proceedings are pending to obtain
" possession of them. * * *

" In my opinion, the bankruptcy act confers no
" such jurisdiction. It makes no provision for
" ancillary or auxiliary proceedings in district
" courts other than that in which the proceedings

"are pending. The remedy of petitioners, if "they have any, is by a proceeding in the state "courts, or if, as it appears is the case in this "proceeding, the bankrupt could have maintained "the action in the national courts if no proceed- "ings in bankruptcy had been instituted against "him, by a plenary proceeding in the circuit "court for this district. * * * That course "is open to petitioners in this case. They may "proceed either in the courts of this state or the "circuit court for this district, setting up the "proceedings now pending in bankruptcy in the "Colorado court, and ask the court to protect the "rights of the creditors in the property situated "in this district, either by an injunction or the "appointment of a receiver; but this court, sit- "ting as a court of bankruptcy, has no such "jurisdiction, and the petition must be denied."

In the case *In re Williams*, 123 Fed. Rep., 321, District Judge HAMMOND, of the Western District of Tennessee, decided that where an adjudication took place in the District of Colorado and the proceedings were there pending, the District Court for the Western District of Tennessee had no ancillary power under the Act of 1898 to make an order on the application of the trustee of the bankrupt requiring persons residing within the district to appear before a referee for examination under Section 21 of the Act.

The Court said:

"The elastic or expansive quality of the word "'ancillary' is misleading possibly in relation to "this subject, and care must be had not to mis- "apply the practice of proceedings known in the "general law as ancillary to the practice under the "bankruptcy statute. * * *

"It is not necessary to go into the technicalities "of any of these examples of ancillary or aux- "iliary jurisdiction, because the existing bank- "ruptcy statute is absolutely destitute of any

" hint of such a jurisdiction in aid of proceedings
" in bankruptcy pending in another district or
" court of bankruptcy. Possibly, Congress might
" have adopted such a scheme of bankruptcy, and
" might have made every District Court in the
" United States a kind of administrator *ad col-*
" *ligendum* of the assets within that district in aid
" of the original court of bankruptcy charged
" with the administration of the bankrupt's
" property; but Congress has done no such thing,
" and therefore the District Courts in the several
" states have no such ancillary or auxiliary jur-
" isdiction as has been invoked by these applica-
" tions. The scheme of the bankruptcy statute is
" that the trustee is equipped with the fullest pos-
" sible title to all property of the bankrupt, to
" all his rights, remedies, and causes of action,
" and certain specific causes of action have been
" created for him or given by the statute, as
" where he may bring suits that the creditors only
" could have brought without the statute. Be-
" sides, he is armed with all the legal rights and
" remedies that the bankrupt had or that any
" other owner might have to enforce his title
" and his rights of action, and these he is re-
" quired to use for the collection of the prop-
" erty and assets of the bankrupt under the
" guidance of the court which appoints
" him. He may bring his action of replevin
" for his race horses or other property; or his
" action at law for the recovery of money; or
" his bills in equity for the enforcement
" of trusts or other equitable remedies; or his
" libels in admiralty, where that jurisdiction ap-
" plies; and he must resort to the courts of the
" states, or to the federal courts in other states,
" according to his right to enter each or either of
" them, for enforcing whatever remedies he may
" have as owner of the bankrupt's estate, and to
" bring whatever causes of action may be neces-

" sary; and this is all he can do in the collection
" of the bankrupt's property for the payment of
" his debts. Simply because he is trustee in bank-
" ruptcy, or simply because he is engaged in the
" administration of a bankrupt's estate in one dis-
" trict, he is not authorized to go to another dis-
" trict, or to a bankruptcy court in another dis-
" trict, and ask for ancillary or auxiliary aid of
" any kind which is not comprehended within the
" same legal and equitable remedies belonging to
" other owners, as above set forth."

In *Ross-Meehan Foundry Co. et al. v. Southern Car & Foundry Co.*, 124 Fed. Rep., 403, decided by District Judge HAMMOND in the same District of Tennessee, it was held that the Court had no power under the Act of 1898 to appoint a Receiver for the property of an alleged bankrupt upon a summary application by parties to a petition in bankruptcy filed in another district without notice to the persons in possession and those otherwise interested as would answer the requirements of due process of law of the Constitution of the United States.

The Court said (at page 406):

" The very purpose of the Constitution in giving
" Congress the power to establish a uniform sys-
" tem of bankruptcy, and the object of every
" bankruptcy statute, is to obviate the disastrous
" effect of the administration of insolvent estates
" in broken pieces, according to the insolvency
" laws of many different states. Ancillary admin-
" istrations of insolvent assets, as found in equity
" courts, are neither desirable nor useful as analo-
" gies of practice in bankruptcy administrations.
" They have no application as precedents for
" bankruptcy proceedings *qua* bankruptcy pro-
" ceedings, and only are applicable when a trustee
" in bankruptcy, just as any other litigant, suing
" another, finds it needful to apply to the ordi-

" nary auxiliary or ancillary jurisdiction of the
" courts to assert his title or other rights devolved
" on him as an owner in trust. Other than this,
" ancillary proceedings in bankruptcy, if they
" may be so called, are unauthorized monstrosi-
" ties in practice, in my judgment. The necessity
" for separate administrations and ancillary pro-
" ceedings should not exist under any well-regu-
" lated system of bankruptcy. The design of the
" statute is to avoid all ancillary proceedings, and
" secure one uniform possession of the estate by a
" single court of bankruptcy having the juris-
" diction to administer the assets everywhere
" under that statute. For the purpose of
" securing that object under the act of 1898,
" the trustee is invested with the title to the prop-
" erty everywhere, and according to the scheme
" of the act is required to go anywhere and every-
" where, and assert his rights to the property in
" any court of competent jurisdiction, just and
" only as any other owner would do. He must
" depend for jurisdiction upon the conditions that
" would surround any other owner, and must pro-
" ceed in any court according to its proper meth-
" ods of procedure, and only as any other owner
" would proceed; and it is a mistake, in my judg-
" ment, to suppose that he has in bankruptcy
" courts or in the other federal courts any right to
" a jurisdiction, authority, or power, by reason of
" the proceedings in bankruptcy, other than any
" owner would have except that he might resort to
" a federal court of competent jurisdiction to en-
" force the rights he has derived by his title to
" the property as a bankruptcy trustee, just as any
" plaintiff presenting a case arising under the Con-
" stitution and laws of the United States might
" do, if it shall be held under the very guarded
" rulings of the Supreme Court of the United
" States on that jurisdiction that his claim of title
" or right to the property does present a case

" arising under the Constitution and laws of the
" United States, thus giving a federal court juris-
" diction where there is no diversity of citizenship
" between him and the defendant in the case he
" makes."

In *re Tybo Mining & Reduction Co.*, 132 Fed. Rep., 697, decided in the District of Nevada in 1904, there was a petition for the appointment of one Butler as Trustee, a petition for a similar remedy having been filed in another district, and the Court refused to take ancillary jurisdiction.

In *re Benedict*, 140 Fed. Rep., 55, decided in Eastern District of Wisconsin in 1905, the question of the appointment of an ancillary receiver under the Act of 1898 was involved. Judge QUARLES referred to the inconvenience which would be involved in administering the Bankruptcy Act if it were held that it did not confer ancillary jurisdiction, such inconvenience arising from the location of assets in widely scattered districts, the delay occasioned by the several steps required to secure an adjudication in bankruptcy and by the selection of a trustee, and the absence of any machinery for preventing the dissipation or loss of property in different districts.

The Court then calls attention to the fact that a receiver in one district has no jurisdiction in another district, and proceeds:

" The next question is whether this court may
" by ancillary proceedings appoint a receiver to
" aid the Illinois court in gathering up and pro-
" tecting the assets of the alleged bankrupt within
" this district pending the proceedings looking to
" the selection of a trustee. This a question that
" has been the source of much perplexity to the
" bar, and has elicited adverse judicial opinions,
" although I believe in practice ancillary jurisdic-
" tion has been generally exercised."

He then refers to the several decisions upon the subject, and proceeds:

> "It will be conceded that ancillary jurisdiction
> "is not expressly provided for by the text of the
> "act of 1898."

and then considers the decisions under the Acts of 1841 and 1867. He concludes his opinion as follows:

> "If it was necessary to effectuate the purposes
> "of the act to impose this status without regard
> "to territorial limits, is it not equally in line with
> "such legislative purpose to maintain such federal
> "control to the end that all the assets, wherever
> "situate, may remain intact until the trustee is
> "invested with title thereto? This can only be
> "done by co-operation among the several District
> "Courts. This proceeding in no proper sense in-
> "augurates a litigation, but culminates in a sup-
> "plementary order. It finds support in the juris-
> "diction already vested in another court of bank-
> "ruptcy to which it is ancillary. The receiver so
> "appointed must account to, and be largely con-
> "trolled by, the original court that is charged
> "with the administration of the estate."

These are all of the decisions under the Act of 1898 and it will be seen that the weight of authority is against the contention of the appellant herein.

Reliance is placed, however, by the appellant upon the decisions under the Acts of 1841 and 1867, and we will examine those decisions in order to point out that they are rendered inapplicable because changes have been made in the Act of 1898 which clearly indicate an intention on the part of Congress to limit the jurisdiction of courts of bankruptcy, both when acting in matters, narrowly speaking, of bankruptcy administration and also when acting as courts of adjudication.

In *ex parte Martin et al.*, 16 Fed. Cases, 874 (decided in 1842), Mr. Justice STORY, sitting as a Circuit

Judge, held that the equity jurisdiction of the District Courts under the Bankrupt Act was not confined to cases originally arising and pending in the particular court where the relief was sought, and that where a creditor living in Massachusetts commenced suits in several States other than Pennsylvania where proceedings were pending against the bankrupt for an adjudication, an injunction would issue against the Massachusetts creditor enjoining him from proceeding in the suits.

Judge STORY referred to the question as "not unattended with doubt and difficulty" as to whether District Courts have any jurisdiction in equity, except in cases originally arising and pending in the particular court. He then proceeds as follows :

> "The language of the sixth section of the act "is : 'That the district court in every district "shall have jurisdiction in all matters and proceed- "ings in bankruptcy arising under the act,' "the said jurisidiction to be exercised summarily, "in the nature of summary proceedings in equity. "The act then goes on to enumerate certain "specific cases and controversies, to what the "jurisdiction extends (which I deem merely affirm- "ative, and not restrictive of the preceding clause); "and then it extends the jurisdiction 'to all acts, "matters and things to be done under, and in vir- "tue of the bankruptcy, until the final distribu- "tion and settlement of the estate of the bank- "rupt, and the close of the proceedings in bank- "ruptcy.' Now, this language is exceedingly "broad and general; and it is not in terms, or by "fair implication, necessarily confined to cases of "bankruptcy originally instituted, and pending in "the particular district court, where the relief "is sought. On the contrary, it is not unnatural "to presume, that as cases, originally instituted "and pending in one district, may apply to reach "persons and property situate in other districts,

"and require auxiliary proceedings therein to per-
"fect and accomplish the objects of the act, the
"intention of congress was, that the district
"courts in every district should be mutually aux-
"iliary to each other for such purposes and pro-
"ceedings. The language of the act is sufficiently
"comprehensive to cover such cases; and I can
"perceive no solid ground of objection to such an
"interpretation of it."

This is the only precedent of any value construing the Act of 1841. There are a number of cases, however, in which the Act of 1867 was considered.

In re Richardson, 20 Fed. Cases, 696 (decided in 1868) bankruptcy proceedings had been commenced and were pending in Louisiana and thereafter a suit was commenced against the bankrupts in a court in the State of New York to collect a debt which was provable in bankruptcy, and the bankrupts themselves applied to the District Court for the Southern District of New York on petition for an injunction staying proceedings in that suit until the close of the bankruptcy proceedings in Louisiana.

It was held by Justice BLATCHFORD, who was then District Judge, that independently of the Bankruptcy Act of 1867 there was no jurisdiction in the District Court to grant the relief asked for, nor was the power to give such a remedy conferred by that act upon any Court except that one in which bankruptcy proceedings were pending.

Judge BLATCHFORD said:

"The first section of the act is limited to the
"powers of the court in which the bankruptcy
"proceedings are pending—the court in which the
"proceedings in bankruptcy are commenced in
"the manner specified in the thirty-eighth section
"of the act.

"The second section is also limited to the
"powers of the district court of the district where

"proceedings in bankruptcy are pending, and to "the powers of that court in regard to suits by and "against the assignee in bankruptcy.

"The twenty-first section, which is the one "giving to district courts the power of granting "injunctions to stay suits and proceedings to "recover debts from bankrupts, cannot be con- "strued as conferring such power upon any other "district court than the 'court in bankruptcy,' "which means the court where the bankrupt pro- "ceedings are pending.

"No other section of the act confers upon "this court the power invoked."

In *Markson v. Heaney*, 16 Fed. Cases, 769 (decided in 1871), a debtor residing in Kansas was adjudged a bankrupt on the petition of his creditors. A mortgage creditor started a suit in a State Court of Indiana to foreclose a mortgage. The mortgagee was a resident and citizen of Minnesota, and the assignees in bankruptcy filed a bill in the Circuit Court of the United States for the District of Minnesota against the mortgagee, charging fraud in the execution of the mortgage and asking that it be declared void and that an injunction issue to restrain the further prosecution of the foreclosure suit. Judge DILLON held that the District Court in which bankruptcy proceedings were pending or the Circuit Court for the same district could, under the Act of 1867, in cases where the suit in the State Court was commenced after the proceedings in bankruptcy, enjoin the plaintiff from further prosecuting the suit. But he further held that the Circuit Court for the Minnesota District had no bankruptcy jurisdiction and could exercise only its ordinary equity powers.

In *Shearman v. Bingham*, 21 Fed. Cases, 1213 (decided by Judge LOWELL in 1871), it was held that a District Court in a district other than that in which bankruptcy proceedings are pending has no jurisdiction under the Act of 1867 of suits by assignees against

debtors of the bankrupt by virtue of any provision of the bankrupt law. But on appeal to the Circuit Court (21 Fed. Cases, 1270), this decision was reversed, Circuit Judge CLIFFORD writing the opinion. He held that the jurisdiction in question did exist and that the Act of 1867 contained language not contained in the Act of 1841 which clearly indicated the intention of Congress to create such jurisdiction, and he especially relied upon the provision to the effect "that the jurisdiction shall extend to the collection of the assets of the bankrupt" which were not contained in the corresponding provision in the Law of 1841.

He adds:

> "Contrary decisions have been made by several "of the district judges, and in one case by a "circuit judge, but it must suffice to remark in "respect to those decisions, that the reasons as- "signed in support of the conclusions, do not "appear to be satisfactory. They assume what is "not correct, that the jurisdiction of the district "courts is confined to the district in which the "proceedings shall be pending. Such an ex- "pression is contained in the first clause of sec- "tion 2 of the act, which describes the revisory "power of the circuit courts, but it is not contained "at all in section 1 of the act, and courts of "justice have no right to enact any such amend- "ment. Suits to collect the assets of the bank- "rupt, except to a very limited extent, cannot "be maintained in the circuit courts, so that if the "theory of the defendant is correct, there is no "right under the bankrupt act to maintain suits "for such a purpose in any federal court in a case "where the debtor resides out of the district in "which the proceedings in bankruptcy are pend- "ing, which cannot be admitted, as the whole "tenor of the bankrupt act shows that congress "intended to provide for the complete adminis- "tration of the bankrupt system in the federal

" courts, and through the instrumentality of fed-
" eral officers. Confirmation of that view is also
" derived from the fact that congress borrowed
" the language employed to describe the ju-
" risdiction of the district courts from the cor-
" responding section in the prior law, which had
" uniformly been so construed by the federal
" courts, and also from the fact that it is settled
" law that congress cannot compel the state courts
" to entertain such jurisdiction in favor of an as-
" signee for the collection of the assets of the
" bankrupt."

In *Goodall v. Tuttle*, 10 Fed. Cases, 579 (decided in 1872), District Judge HOPKINS, of the Western District of Wisconsin, in 1872 considered the question as to whether a suit could be maintained by an assignee in bankruptcy to collect the assets of a bankrupt in any other District Court than that in which the proceedings in bankruptcy were pending, the act not expressly conferring power to maintain such a suit. He held that the power should be implied from the provision of the statute which conferred upon the Court power " to collect the assets ".

In *Lathrop v. Drake*, 91 U. S., 516, the Supreme Court specifically upheld the doctrine of *Shearman v. Bingham, supra.* Justice BRADLEY, speaking of the jurisdiction of the District Court, said:

" Of this there are two distinct classes: first,
" jurisdiction as a court of bankruptcy over the
" proceedings in bankruptcy initiated by the peti-
" tion, and ending in the distribution of assets
" amongst the creditors, and the discharge or
" refusal of a discharge of the bankrupt; secondly,
" jurisdiction, as an ordinary court, of suits at
" law or in equity brought by or against the as-
" signee in reference to alleged property of the
" bankrupt, or to claims alleged to be due from or
" to him. The language conferring this jurisdic-

"tion of the district courts is very broad and gen-
"eral. It is, that they shall have original juris-
"diction in their respective districts in all mat-
"ters and proceedings in bankruptcy. The various
"branches of this jurisdiction are afterwards speci-
"fied; resulting, however, in the two general
"classes before mentioned. Were it not for the
"words, 'in their respective districts,' the juris-
"diction would extend to matters of bankruptcy
"arising anywhere, without regard to locality. It
"is contended that these words confine it to cases
"arising in the district. But such is not the
"language. Their jurisdiction is confined to their
"respective districts, it is true; but it extends to
"all matters and proceedings in bankruptcy with-
"out limit. When the act says that they shall
"have jurisdiction in their respective districts, it
"means that the jurisdiction is to be exercised in
"their respective districts. Each court within its
"own district may exercise the powers conferred;
"but those powers extend to all matters of bank-
"ruptcy, without limitation."

Again, at page 518, Judge BRADLEY said:

"Proceedings ancillary to and in aid of the pro-
"ceedings in bankruptcy may be necessary in
"other districts where the principal court cannot
"exercise jurisdiction; and it may be necessary
"for the assignee to institute suits in other dis-
"tricts for the recovery of assets of the bankrupt.
"That the courts of such other districts may ex-
"ercise jurisdiction in such cases would seem to
"be the necessary result of the general jurisdic-
"tion conferred upon them, and is in harmony
"with the scope and design of the act. The State
"courts may undoubtedly be resorted to in cases
"of ordinary suits for the possession of property
"or the collection of debts; and it is not to be
"presumed that embarrassments would be en-

> " countered in those courts in the way of a prompt
> " and fair administration of justice. But a uniform
> " system of bankruptcy, national in its character,
> " ought to be capable of execution in the national
> " tribunals, without dependence upon those of the
> " States in which it is possible that embarrass-
> " ments might arise."

The Court also held that the Circuit Courts within each district had under Section 2 of the Act of 1867 concurrent jurisdiction in the same district with District Courts in reference to certain matters referred to in that section.

Finally, he referred to the amendments of 1874, saying that they had little bearing upon the question under consideration, although they

> " removed any ambiguity that may have existed,
> " but did not thereby impress a more restricted
> " meaning upon the language of the original act
> " than was due to it by a fair judicial construc-
> " tion."

The last decision under the Act of 1867 which is in point is *In re Tifft*, 23 Fed. Cases, 1213 (decided by Judge CHOATE in 1879) in which the principle of *Lathrop v. Drake* is applied, and it is held that ancillary jurisdiction would enable a Court within its own district to grant injunctions, stay proceedings, enforce the provisions of composition resolutions, or administer other summary relief as a court in bankruptcy. Referring to the case of *Shearman v. Bingham*, Judge CHOATE said :

> " This case and its approval by the Supreme
> " Court of the United States must be taken,
> " therefore, to have set at rest the doubts that
> " before existed on these points."

Upon the authority of these cases it may be conceded that under the Bankruptcy Acts of 1841 and

1867, ancillary jurisdiction, both in summary proceedings and in plenary suits, existed in all District Courts within their respective districts; and the question, therefore, remains whether the provisions of the Act of 1898 show an intention on the part of Congress to restrict such jurisdiction so that the inferences of the courts based upon the general language of the earlier acts cannot be indulged under the Act of 1898.

It was probably due to the uncertainty which had existed under the Act of 1841 as to the extent of the ancillary jurisdiction of District Courts that Congress was led to insert in Section 1 of the Law of 1867 the words "that the jurisdiction shall extend to the collection of the assets of the bankrupt," which, as Justice CLIFFORD remarks in *Shearman vs. Bingham*, were not contained in the corresponding provisions of the Law of 1841 and which influenced him in reaching the conclusion that Congress intended to vest in District Courts outside the district where bankruptcy proceedings were pending jurisdiction to collect debts due to the bankrupt estate. The addition of these words, however, did not make the act so clear as to remove all doubt, for such an eminent bankruptcy judge as District Judge LOWELL expressed the opinion that the effect of Sections 1 and 2 of the Act of 1867 was to limit the jurisdiction of the Circuit and District Courts to the district in which the petition in bankruptcy was filed, not regarding himself as bound by the decision of Justice STORY under the Act of 1841 in the *Martin* case. While this decision of Judge LOWELL was reversed in the Circuit Court, it is significant that only two years after the reversal Congress passed the amendatory act of 1874. The original act had provided as follows:

> "Said Circuit Court shall also have concurrent "jurisdiction with the district courts of the same "district of all suits at law or in equity which "may or shall be brought by the assignee in "bankruptcy against any person claiming an ad-

"verse interest, or by such person against such "assignee, touching any property or rights of "property of said bankrupt transferable to or "vested in such assignee."

The amendment of 1874 provided that—

"The several Circuit Courts shall have, within "*each* district, concurrent jurisdiction with the "district court of *any* district * * * , of all "suits at law or in equity * * * ."

In *Lathrop v. Drake*, Justice BRADLEY said of the amendatory act that it "removed any ambiguity "that may have existed." The original act and the amending act clearly permitted the inference by the courts that Congress intended without restriction to confer general bankruptcy powers which would result in a uniform system throughout the country. And if the language of the Act of 1898 had remained in the general form used in the earlier acts, the decisions under those acts would have decisive weight. But for some reason not appearing upon the face of the statute, the Act of 1898 contains restrictive provisions as to the jurisdiction of both the circuit and the district courts which weaken if they do not entirely destroy the force of the reasoning of the earlier decisions based upon the general language of the former statutes. Several instances of these restrictive provisions may be referred to.

While Section 2 of the Act of 1898 contains the general provision conferring upon District Courts original jurisdiction within their respective territorial limits, yet among the nineteen subdivisions of the section which specified various proceedings in bankruptcy to which the jurisdiction was to apply, Subdivision 7 confers power to "cause the estates of bankrupts to "be collected, reduced to money and distributed, and "determine controversies in relation thereto, *except as* "*herein otherwise provided.*" Section 23 contains

provisions which may be regarded as coming within this exception, and clearly restricts the jurisdiction of Circuit and District Courts within much narrower limits than existed under the Act of 1841, according to Judge STORY's decision in *ex parte Martin*, or under the Act of 1867, according to the decision of Judge CLIFFORD in *Shearman v. Bingham*, or of the Supreme Court in *Lathrop v. Drake*. Section 23 provides as follows:

> "*(a)* The United States circuit courts shall "have jurisdiction of all controversies at law and "in equity, as distinguished from proceedings in "bankruptcy, between trustees as such and ad- "verse claimants concerning the property ac- "quired or claimed by the trustees, *in the same "manner and to the same extent* ONLY *as though "bankruptcy proceedings had not been instituted and "such controversies had been between the bankrupts "and such adverse claimants.*
>
> "*(b) Suits by the trustee shall* ONLY *be brought "or prosecuted in the courts where the bankrupt, "whose estate is being administered by such trustee, "might have brought or prosecuted them if pro- "ceedings in bankruptcy had not been instituted, "unless by consent of the proposed defendant, ex- "cept suits for the recovery of property under "section 60, subdivision b, and section sixty-seven, "subdivision e.*

While by this language jurisdiction is conferred upon courts outside the district where the bankruptcy is pending, there is a plain intention to restrict this jurisdiction to the specific cases mentioned and to limit any inference of a broader jurisdiction which might otherwise have been drawn from the general language of Subdivision 7 of Section 2. There was no such limitation in Section 6 of the Act of 1841. It was the general language of that section which led Judge STORY to make the inferences in *ex*

parte Martin as to the intent of Congress. Judge CLIFFORD's opinion in *Shearman v. Bingham* was founded on the general provision of Section 1 conferring upon District Courts power to collect "all the assets of the bankrupt," which is the provision contained in Subdivision 7 of Section 2 of the Act of 1898 in substantially the same form. And Justice BRADLEY's decision in *Lathrop v. Drake* was based upon the general language of Sections 1 and 2 of the Act of 1867.

Under the Acts of 1841 and 1867, there was no limitation upon the jurisdiction of the Circuit Courts based upon the diversity of citizenship or upon any other fact upon which, under the Federal Judiciary Act, such jurisdiction was made to depend. By Section 23 of the Act of 1898, however, defendant's trustees in bankruptcy may not, without the consent of the proposed defendants, bring suits concerning the property of the estate, which are not, strictly speaking, proceedings in bankruptcy, unless the bankrupt might have brought them if bankruptcy proceedings had not been instituted. This restriction is of wide application. A like restriction is imposed upon the jurisdiction of District Court. It would, of course, have swept away all the jurisdiction of suits of all kinds brought by the Trustee in District Courts, if Congress had not saved to the District Courts certain powers peculiarly needed for the administration of a bankruptcy system and had not inserted the exception that subdivision *b* of Section 23 was not to apply to "suits for the recovery of property under Sec-
" tion 60, subdivision *b*, and Section 67, subdivision *e*."

Section 60, subdivision *b*, refers to preferences given within four months before the filing of the petition in bankruptcy and provides that they may be recovered by the trustee. And the section further provides:

> " And, for the purpose of such recovery, any
> " court of bankruptcy, as hereinbefore defined, and
> " any State court which would have had jurisdic-

" tion if bankruptcy had not intervened, shall have
" concurrent jurisdiction."

Section 67, subdivision *e*, provides that conveyances in fraud of creditors shall be null and void and that it shall be the duty of the trustee to sue to recover the property conveyed, and that "for the purpose of such " recovery any court of bankrupty, as hereinbefore " defined, and any State court which would have juris- " diction if bankruptcy had not intervened, shall have " concurrent jurisdiction."

It is obvious that Congress believed that if the exception contained in Section 23 had not been inserted the general language of the statute could not have been construed so as to give to the district courts the jurisdiction expressly conferred by the sections which have just been quoted. The entire reasoning of the decisions under the earlier acts, both as to summary proceedings and plenary actions was based upon the fact that the general language of the acts by which jurisdiction in bankruptcy was conferred indicated no intention to impose any restrictive limits and, therefore, that the courts were at liberty to attribute to Congress an intention by the use of general language to accomplish that which the judges believed to be the only way in which a uniform system of bankruptcy could be effectually administered. Such reasoning cannot be applied to the act of 1898 and we respectfully submit that no jurisdiction exists except that which is specifically conferred by the act.

If it had been desired to continue in the District and Circuit Courts the broad general jurisdiction which had been under the previous acts conferred upon them, it is fair to assume that Congress, having its attention called to the general language of the previous acts, to the doubt which had been expressed as to its meaning and to the judicial interpretation which had finally been placed upon it, would have inserted in the act of 1898 specific provisions creating the jurisdiction now contended for. It is significant in this connection that

at the last session of Congress there was introduced an amendment to the Act of 1898 conferring upon District Courts in bankruptcy the kind of ancillary judisdiction which it is claimed by the appellant to exist under the act. The bill, however, failed to pass. It is referred to in *Vol., 43, No. 46, page 2050* of the Congressional Record.

It does not avail to urge that the general jurisdiction for which the appellant contends is preserved, in spite of Sections 23, 60 and 67 by the sentence at the close of Section 2 which is as follows:

> "Nothing in this section contained shall be
> "construed to deprive a court of bankruptcy of
> "any power it would possess were certain specific
> "powers not herein enumerated."

That language might be availed of in relation to those powers which were affirmatively given by Section 2; but it would not avail to affect the argument made above. A court of bankruptcy has no powers except those conferred by the Statute and we have shown that the powers contended for have not been conferred.

Subdivisions (7) and (15) of Section 2 of the Bankruptcy Act are also referred to as conferring the ancillary jurisdiction contended for. Subd. (7) provides that courts of bankruptcy within their respective territorial limits may exercise original jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto, except as herein otherwise provided," and Subd. (15) provides that such courts shall have power "to make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." So far as plenary actions are concerned there can be no inference based upon the general language of these subdivisions that courts of bankruptcy have any ancillary jurisdiction

except that expressly conferred by Sections 23, 67 and 70 above referred to. And it seems clear that a like limitation must be placed upon the language of these subdivisions in respect of jurisdiction in summary proceedings in bankruptcy.

Lathrop v. Drake and *Shearman v. Bingham* were both plenary actions and both cases would necessarily have been decided the other way under the Act of 1898, unless jurisdiction could have been found to exist under the specific language of Section 67*b*. It is difficult to see how upon the reasoning in these cases it can be argued that in spite of the restrictions placed upon the jurisdiction of the Courts in plenary suits there can still be inferred from the general language of Section 2, that summary ancillary jurisdiction was to be preserved. If such an inference be made we might have the anomaly of a District Court in a summary ancillary proceeding ordering the surrender possession of property of the bankrupt although on account of the limitations of Section 23 it had no jurisdiction to entertain a suit for damages for withholding such possession. Other instances might be given, but it is not necessary. Congress has indicated clearly a policy of restricting the jurisdiction of the Federal Courts, and precisely defining what that jurisdiction should be. It may well be that Congress thought that outside of the district where bankruptcy proceedings were commenced the drastic summary proceedings of the bankrupt act were subject to abuse. But whatever the reason, we are not so much concerned with it as with the construction of the statute itself which we submit should not have given to it the broad meaning contended for.

POINT II.

The trustee in bankruptcy has not the title to the books in question.

Even if this application had been made to the District Court which originally adjudicated the Randolph-Macon Coal Company a bankrupt, it would not have had power, in a summary proceeding, to direct the delivery of the books in question to the trustee. The title of trustee to these books is disputed by Messrs. Gardiner and Dutcher. Under the cases, therefore, his remedy to establish his title or right to possession lies in a plenary action.

In *Jaquith vs. Rowley*, 188 U. S., 620, a trustee in bankruptcy applied to the Court for an order directing a surety to turn over to him funds that had been deposited in his hands by the bankrupt as security for the surety's liability on the bankrupt's bail bond. The Court held that it did not have jurisdiction to entertain such proceeding by summary application.

The petition filed by the trustee alleges that certain books and papers relating to the business of the bankrupt, to wit: the stock certificate book, the corporation minute book and the stock ledger are in the custody of Gardiner or Dutcher (petition, Rec., fol. 5). The nature of the books in Dutcher's possession appears from his affidavit and the exhibits attached. From these it appears that these books do not relate to the property of the corporation. The Bankrutcy Act, Section 70-A, provides:

> "The trustee of the estate of a bankrupt upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to

property which is exempt to all (1) documents relating to his property;"

Documents are defined in Subdivision 13 of Section 1 of the Act as follows: "Document shall include any book, deed or instrument in writing;" it is therefore only to those books or documents which relate to the property of the bankrupt that the trustee has title. The stock certificate books of the shares of stock of the Randolph-Macon Coal Company do not relate to the property of the corporation in any sense of the word. They describe not the property of the corporation but the property of its shareholders, *i. e.*, their rights in the corporation. An examination of exhibits A, B and C (Rec., pp. 7, 8) shows that the only information to be derived from the stock certificate books would be the number of shares of the capital stock of the Company outstanding, the names of the shareholders and the dates of the issuance and transfers of the certificates. No other information is contained in the stock ledger and stock transfer book of the corporation, copies of which are annexed to Dutcher's affidavit and marked Exhibits D and E (Rec., pp. 8, 9). These books cannot, therefore, be said to relate to the property of the corporation. The remaining documents in Dutcher's possession are the minutes of the meetings of directors and stockholders of the Randolph-Macon Coal Company and the unused first mortgage bonds. There is no provision in the laws of Missouri whereby the corporation is obliged to keep minutes of the meetings of directors or stockholders. Such minutes, if kept, are kept solely for the convenience of the directors and stockholders and are their property and not the property of the corporation. The unused first mortgage bonds do not relate to property of the corporation either. What is evidently meant by this section of the Bankruptcy Act is not such books as are claimed here, but title deeds, policies of insurance, account ledgers, in other words, muniments of title and books which deal with the accounts of the

corporation. All the account books of this corporation have been turned over to the trustee in bankruptcy and there are none remaining in the hands of the president or secretary or involved in this controversy.

POINT III.

The order of the District Court should be affirmed.

HENRY W. TAFT,
Of Counsel for Appellees James T. Gardiner and Howard Dutcher,
40 Wall Street,
City of New York.

BABBITT, TRUSTEE IN BANKRUPTCY, *v.* DUTCHER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 39. Argued November 29, 1909.—Decided February 21, 1910.

Corporate records and stock-books of a corporation adjudicated a bankrupt pass to the trustee and, where there is no adverse holding, the bankruptcy court can compel their delivery by summary proceeding.

In a case in which the original court of bankruptcy can act summarily, another court of bankruptcy, sitting in another district, can do so in aid of the court of original jurisdiction.

THE Randolph-Macon Coal Company was a Missouri corporation, and was duly adjudicated a bankrupt March 26, 1907, in proceedings instituted in the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri. Byron F. Babbitt was duly appointed trustee in bankruptcy for the corporation May 10, 1907, and duly qualified by giving bond on that day.

He thereafter made demand upon the president of the company for the delivery to him of the corporate records and stock books of the bankrupt company, which were kept in the office maintained by the company in New York city. This request was refused by letter of the president of the company, dated September 24, 1907, in which he says that he is advised "that such records and stock books are not documents relating to the property of the bankrupt, and therefore you, as trustee in bankruptcy, are not entitled to their possession."

Thereupon the trustee made application to the District Court in and for the Southern District of New York, by peti-

tion, for an order directing James T. Gardiner, the president, and Howard Dutcher, the secretary, of the company, or either of them, to deliver to him the stock-certificate book, the corporation minute book and the stock register of said company, together with all other records and documents belonging to said company in their possession or under their control. Gardiner and Dutcher were within the jurisdiction of the District Court for the Southern District of New York, and the books and papers referred to were within their custody there, and the trustee alleged that the stock-certificate book, the corporation minute book, and the stock register book were necessary to the trustee in his administration and settlement of the affairs of the company.

Thereafter a hearing was had on the petition, the order to show cause and return thereto, and the District Judge (Holt, J.) endorsed on the petition: "I am obliged to deny this motion on the authority of *In re Von Hartz et al.*, 142 Fed. Rep. 726," and ordered that the motion be denied on the ground that the court was without jurisdiction to entertain the proceeding, or to grant the relief prayed for, and the District Judge also certified that the order denying the motion and refusing to grant the relief was based solely on the ground that the court was without jurisdiction "to entertain proceedings instituted by a trustee in bankruptcy duly appointed in a bankruptcy proceeding pending in another district, to compel the officers of the bankrupt to deliver to such trustee the documents in their possession relating to the business of the bankrupt."

This appeal was then allowed and duly prosecuted.

Mr. William B. Hornblower, with whom *Mr. Morgan M. Mann* was on the brief, for appellant:

The title to all books and papers relating to the business of the bankrupt was vested in the trustee. Subd. 1, § 70, and subd. 13, of § 1 of the bankrupt act. See *Matter of Hess*, 134 Fed. Rep. 109; *Mueller* v. *Nugent*, 184 U. S. 1. And, as

held in that case, it is proper to resort to summary proceedings in the bankrupt court rather than to replevin in the state court.

The District Court in New York had jurisdiction to entertain this proceeding and grant the relief prayed for. The act of 1898 in this respect is similar to the act of 1867. And see *Lathrop* v. *Drake*, 91 U. S. 516; *Sherman* v. *Bingham*, Fed. Cas. 12,762; *Goodall* v. *Tuttle*, Fed. Cas. 5,533; *McGehee* v. *Hentz*, Fed. Cas. 8,794; *Re Tifft*, Fed. Cas. 14,034; *Payson* v. *Dietz*, Fed. Cas. 10,861; *Re Benedict*, 140 Fed. Rep. 55; *Re Peiser*, 115 Fed. Rep. 199; *Re Sutter Bros.*, 131 Fed. Rep. 654, distinguishing *Re Williams*, 173 Fed. Rep. 321, and *Re Nelson Co.*, 149 Fed. Rep. 590. See also Loveland on Bankruptcy, 3d ed., § 21. *Re Von Hartz*, 142 Fed. Rep. 726, to effect that ancillary jurisdiction does not exist, and which controlled the decision in this case, was erroneously decided by the Circuit Court of Appeals; nor does *Re Wood & Henderson*, 210 U. S. 246, apply. Denying ancillary jurisdiction renders the enforcement of the bankruptcy act difficult; in some cases it practically nullifies the act.

In two recent decisions, *Re Dunseath*, 168 Fed. Rep. 973, and *Re Dempster*, 172 Fed. Rep. 353, ancillary jurisdiction of the bankruptcy court was sustained and there is no decision of this court adverse to such jurisdiction. *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *White* v. *Schloerb*, 178 U. S. 542; *Bryan* v. *Bernheimer*, 181 U. S. 188; *Mueller* v. *Nugent*, 184 U. S. 1; *Jaquith* v. *Rowley*, 188 U. S. 620; *Re Wood & Henderson*, 210 U. S. 246, do not hold that ancillary jurisdiction does not exist.

Mr. Henry W. Taft for appellee:

The trustee in bankruptcy has not the title to the books and cannot compel their delivery in summary proceedings even in the original district of the bankruptcy. The title of the trustee to the books is disputed.

The District Court has no ancillary jurisdiction on applica-

tion of a trustee in bankruptcy appointed by another District Court to compel by summary order the delivery to him of property of the bankrupt. *Foundry Co.* v. *Car Co.*, 124 Fed. Rep. 403; *Re Tybo Mining Co.*, 132 Fed. Rep. 697; *Re Benedict*, 140 Fed. Rep. 55; *Ex parte Martin*, 16 Fed. Cas. 874; *Re Richardson*, 20 Fed. Cas. 696; *Markson* v. *Heaney*, 16 Fed. Cas. 769; *Sherman* v. *Bingham*, 21 Fed. Cas. 1,270; *Goodall* v. *Tuttle*, 10 Fed. Cas. 579; *Lathrop* v. *Drake*, 91 U. S. 516; *Re Tifft*, 23 Fed. Cas. 1,213.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

Subdivision 1 of § 70 of the bankruptcy act of 1898 provides that the trustee of the estate of a bankrupt shall be vested by operation of law, as of the date of the adjudication, with the title of the bankrupt (*a* 1) to all "documents relating to his property," and subdivision 13 of § 1 of the act provides that "'documents' shall include any book, deed, or instrument in writing."

Respondents, as officers of the bankrupt company, asserted no adverse claim, but denied that the corporate records and stock books were "documents relating to the property of the bankrupt," and asserted that therefore the trustee in bankruptcy was not entitled to their possession.

We have no doubt that the books and records in question passed, on adjudication, to the trustee, and belong in the custody of the bankruptcy court, and, there being no adverse holding, that the bankruptcy court had power upon a petition and rule to show cause to compel their delivery to the trustee. *Bryan* v. *Bernheimer*, 181 U. S. 188; *Mueller* v. *Nugent*, 184 U. S. 1; *Louisville Trust Company* v. *Comingor*, 184 U. S. 18; *First National Bank* v. *Title & Trust Company*, 198 U. S. 280; *Whitney* v. *Wenman*, 198 U. S. 539.

This brings us to the real question in the case and upon which the decision was rendered, namely, whether the District

Court of the United States in and for the Southern District of New York had jurisdiction to entertain this particular proceeding and grant the relief prayed for.

In *Ex parte Martin*, 16 Fed. Cas. 874, decided in 1842, Mr. Justice Story, sitting on circuit, held that the equity jurisdiction of the District Courts, under the bankruptcy act of 1841, was not confined to cases originally arising and pending in the particular court where the relief was sought, and where a creditor living in Massachusetts commenced suits in several States other than Pennsylvania where proceedings were pending against the bankrupt for an adjudication, that an injunction would issue against the Massachusetts creditor enjoining him from proceeding in the suits. Mr. Justice Story said:

"The language of the sixth section of the act is: 'That the District Court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under the act,' the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity. The act then goes on to enumerate certain specific cases and controversies, to what the jurisdiction extends (which I deem merely affirmative, and not restrictive of the preceding clause); and then it extends the jurisdiction 'to all acts, matters and things to be done under, and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.' Now, this language is exceedingly broad and general; and it is not in terms, or by fair implication, necessarily confined to cases of bankruptcy originally instituted, and pending in the particular District Court, where the relief is sought. On the contrary, it is not unnatural to presume, that as cases, originally instituted and pending in one district, may apply to reach persons and property situate in other districts, and require auxiliary proceedings therein to perfect and accomplish the objects of the act, the intention of Congress was, that the District Courts in every district should be mutually

auxiliary to each other for such purposes and proceedings. The language of the act is sufficiently comprehensive to cover such cases; and I can perceive no solid ground of objection to such an interpretation of it."

Section 1 of the bankruptcy act of 1867 and § 2 of the bankruptcy act of 1898 are substantially identical as to the jurisdiction of the District Courts sitting as courts of bankruptcy, as will appear from the following comparison:

Section 1 of the Bankruptcy Act of 1867:

"That the several district courts of the United States be, and they hereby are constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. . . .

"And the jurisdiction hereby conferred shall extend. . . .

"To the collection of all the assets of the bankrupt . . . and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the

Section 2 of the Bankruptcy Act of 1898:

"That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the Supreme Court of the District of Columbia, the District Courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter

bankrupt, and the close of the proceedings in bankruptcy."

held, to . . . (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; . . . (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; . . .

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

In *Sherman* v. *Bingham*, Fed. Cas. No. 12,762; 21 Fed. Cas. 1,270, Mr. Justice Clifford, sitting on circuit, and construing the act of 1867, reversed the judgment of the District Court, which held that an assignee in bankruptcy of a person declared a bankrupt in one District Court could not maintain an action to recover moneys paid the defendants, residents of another district, in the District Court of such district. And Mr. Justice Clifford said:

"District Courts have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and the argument is, that inasmuch as the jurisdiction must be exercised in the district for which the district judge is appointed, the District Court, sitting as a court of bankruptcy, cannot exercise jurisdiction in any case except in the district

where the bankruptcy proceedings are pending; but § 1 of the bankrupt act contains no such limitation, nor does it contain any words which, properly considered, justify any such conclusion.

"General superintendence and jurisdiction of all cases and questions under the act are conferred upon the several Circuit Courts, except where special provision is otherwise made by the first clause of § 2 of the act; but the subsequent language of the same clause makes it clear that the jurisdiction conferred by that clause can only be exercised within and for the district 'where the proceedings in bankruptcy shall be pending.' No such limitation, however, is found in the clause of § 1, conferring jurisdiction upon the District Courts as courts of bankruptcy. Judges of the District Courts must sit undoubtedly in the districts for which they are respectively appointed, and no doubt is entertained that the process of the court in proceedings in bankruptcy cases, is restricted to the territorial limits of the district; but the language of § 1 of the bankrupt act describing the jurisdiction of the District Courts, sitting as courts of bankruptcy, is, that they shall have original jurisdiction in their respective districts, 'in all matters and proceedings in bankruptcy,' showing unquestionably that they can only sit and exercise jurisdiction in their own districts; but the limitation that the proceedings in bankruptcy must in all cases be pending in that district, is not found in that clause of § 1 of the act. On the contrary, the same section provides that the jurisdiction conferred, that is, the jurisdiction of the several District Courts, shall extend to all cases and controversies arising between the bankrupt and any creditor, or creditors, who shall claim any debt or demand under the bankruptcy act, and also to the collection of all the assets of the bankrupt, to the ascertainment and liquidation of the liens, and other specific claims thereon, to the adjustment of the various priorities and conflicting interests of all parties, and to the marshalling and disposition of all the different funds and assets, so as to secure the rights of all

parties, and the due distribution of the assets among all the creditors, and to all acts, matters and things to be done under and in virtue of the bankruptcy."

In *Lathrop* v. *Drake*, 91 U. S. 516, 517, the question of the ancillary jurisdiction of the District Court under the act of 1867 was considered, and the decision in *Sherman* v. *Bingham* approved. Mr. Justice Bradley, delivering the opinion, said:

"Their jurisdiction is confined to their respective districts, it is true; but it extends to all matters and proceedings in bankruptcy without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy, without limitation. There are, it is true, limitations elsewhere in the act; but they affect only the matters to which they relate. Thus, by § 11, the petition in bankruptcy, and by consequence the proceedings thereon, must be addressed to the judge of the judicial district in which the debtor has resided, or carried on business, for the six months next preceding; and the District Court of that district, being entitled to and having acquired jurisdiction of the particular case, necessarily has such jurisdiction exclusive of all other District Courts, so far as the proceedings in bankruptcy are concerned. But the exclusion of other District Courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the nec-

essary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act. The state courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise. The question has been quite fully and satisfactorily discussed by a member of this court in the First Circuit, in the case of *Sherman* v. *Bingham*, 7 Bank. Reg. 490; and we concur in the opinion there expressed, that the several District Courts have jurisdiction of suits brought by assignees appointed by other District Courts in cases of bankruptcy."

The same question was considered in *Goodall* v. *Tuttle*, Fed. Cas. No. 5,533; 10 Fed. Cas. 579, which arose under the act of 1867, and the same conclusion reached, as also in *McGehee* v. *Hentz*, Fed. Cas. No. 8,794; 16 Fed. Cas. 103, and *In re Tifft*, Fed. Cas. No. 14,034; 23 Fed. Cas. 1,213. On the authority of these decisions it must be and is conceded that under the bankruptcy acts of 1841 and 1867 ancillary jurisdiction, both in summary proceedings and in plenary suits, existed in all District Courts within their respective districts; and the question really is whether the provisions of the act of 1898 are to the contrary, or, as appellee's counsel puts it, show an intention on the part of Congress to restrict such jurisdiction so as to cut off the inferences drawn from the language of the earlier acts.

But neither the act of 1867, nor the act of 1898, expressly confers or expressly negatives ancillary jurisdiction in courts other than the court of adjudication. The provisions as to summary jurisdiction in the two acts are substantially identical, and it appears to us should receive the same construction.

In re Benedict, 140 Fed. Rep. 55; *In re Peiser*, 115 Fed. Rep. 199; *In re Sutter Bros.*, 131 Fed. Rep. 654; *In re Nelson Company*, 149 Fed. Rep. 590.

It is, however, urged that the act of 1898 contains restrictive provisions as to the jurisdiction of both the Circuit and District Courts which weaken the force of the reasoning of the decisions based upon the general language of the earlier statutes. Subdivision 7 of § 2 of the act of 1898 confers power to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." And it is said that the following provisions of § 23 should be regarded as coming within the exception and operating to restrict the jurisdiction:

"(*a*) The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"(*b*) Suits by the trustees shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under § 60, subdivision *b*, and § 67, subdivision *e*."

Section 60, subdivision *b*, refers to preferences given within four months before the filing of the petition in bankruptcy, and provides that they may be recovered by the trustee, and further: "And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Section 67, subdivision *e*, provides that conveyances in fraud of creditors shall be null and void, and that it shall be the duty of the trustee to sue to recover the property conveyed, and that "for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

But the general jurisdiction was not restricted by these provisions, though they operated to mitigate the rigor of the rule laid down in the *Bardes case*.

There are two classes of cases arising under the act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy.

In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated.

In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation.

The former class falls within the ruling in the case of *Bardes* v. *Hawarden Bank*, 178 U. S. 524, and in the case of *Jaquith* v. *Rowley*, 188 U. S. 620, which hold that such a suit can be brought only in a court which would have had jurisdiction of a suit by the bankrupt against the adverse claimant, except where the defendant consents to be sued elsewhere.

In the latter class of cases a plenary suit is not necessary, but the case falls within the rule laid down in *Bryan* v. *Bernheimer*, 181 U. S. 188, and *Mueller* v. *Nugent*, 184 U. S. 1,

which held that the bankruptcy court could act summarily. The question was not discussed as to whether a court other than the court of adjudication could exercise this summary jurisdiction.

The precise question before us on the present appeal is whether in a case in which the original court of bankruptcy could act summarily another court of bankruptcy, sitting in another district, can do so in aid of the court of original jurisdiction.

Judge Holt, after expressing an opinion upholding ancillary jurisdiction, felt compelled to decide otherwise in this case on the authority of *In re Von Hartz*, 142 Fed. Rep. 726, decided by the United States Circuit Court of Appeals for the Second Circuit. It appears from the statement of the case in the opinion of the court in the matter of *Von Hartz* that the proceeding was a summary application in which the appellant had been directed to turn over to the trustee in bankruptcy a policy of life insurance upon the life of the bankrupt, which "had theretofore been assigned by Von Hartz to appellant." It was not stated in the opinion whether the assignment was prior or subsequent to the proceedings in bankruptcy. If prior thereto, then neither the court where the bankruptcy proceedings were pending nor any other court could grant a summary order disposing of the title of the adverse claimant claiming title to the policy by assignment. That could only be determined in a plenary suit, and would fall within the rule in the *Bardes* and *Jaquith cases*. But if the assignment was subsequent to the bankruptcy proceedings, then it would be a nullity, and would be disregarded by the bankruptcy court, and possession could be given to the trustee by a summary order, as in the *Bryan* and *Mueller cases*.

There is no decision of this court adverse to the ancillary jurisdiction of the District Courts as asked to be exercised in this case.

Upon the whole, we are of opinion that the District Court for the Southern District of New York had jurisdiction of the

petition below and to grant the relief therein prayed for, and therefore we

Reverse the order of that court denying the petition, and remand the cause for further proceedings in conformity with law.